

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





76-1357

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-1357

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UNITED STATES OF AMERICA

Appellant,

-against-

SIDNEY SALZMANN,

Appellee.

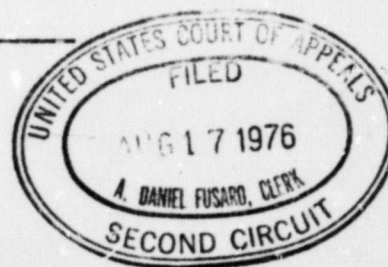
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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APPENDIX

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DAVID G. TRAGER,  
United States Attorney,  
Eastern District of New York

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72CR 740

CLOSED

WEINSTEIN, J. A

## TITLE OF CASE

THE UNITED STATES

## ATTORNEYS

For U. S.:

HYPER

VS.:

SIDNEY E. SALZMANN

For Defendant:

selective service violation.

## ABSTRACT OF COSTS

## AMOUNT

## CASH RECEIVED AND DISBURSED

## DATE

## NAME

## RECEIVED

## DISBURSED

Fine,

Clerk,

Marshal,

Attorney,

Commissioner's Court,

Witnesses,

## DATE

## PROCEEDINGS

- 26-72 Before ROSLING, J. - Indictment filed.
- 18-72 Before WEINSTEIN, J. - Case called. Deft not present. Bench warrant ordered.
- 30-72 Bench Warrant Issued
- 10-74 By Weinstein J - Order filed appointing Prof. Louis Lusky to represent the deft and to appear on 9-20-74 at 10:00 am.
- 11-13-74 Letter of 9/13/74 filed recd from Chambers to J. Weinstein from David Treger that the above Order is stayed pending the hearing of Louis Lusky will appear as friend of the Court. Clerk of the Court to inform the parties.
- 16-74 Letter to chambers from Michael E. Tigar dated 9-11-74 and 4 documents relating to matter filed. ( Filed in 43456)
- 12-20-74 Before WEINSTEIN, J. - Case called - Deft not present - Govt's motion to set aside the court's order of Sept. 10, 1974 - Court holds that neither party to



DATE	PROCEEDINGS
	appoint counsel-Opinion to be filed-Hearing on motion to dismiss by Mr. Lutsky to be set by telephone
2/2/74	By WEINSTEIN, J. - Memorandum and Order dated Sept. 20, 1974 filed that the Govt's motion to set aside this court's order of Sept. 10, 1974 is denied
9/1/74	By WEINSTEIN, J. - Revised Memorandum and Order dated 9/30/74 filed etc. (in CR 43456)
1/29/74	Memorandum of amicus curiae filed re: motion to dismiss for denial of speedy trial (filed in CR43456)
11-1-74	Additional grounds for dismissal filed by deft.
11-1-74	Before WEINSTEIN J - case called for dismissal - deft not present - motion argued - decision reserved (see CR 43456)
1/1/74	Memorandum of Amicus Curiae re Issues raised in hearing of Nov. 1, 1974 filed (filed in CR43456)
11-8-74	Inquiries to atty for the Govt filed.
11-11-74	Amicus's suggestion of possible basis for dismissal filed.
1/11/74	Affidavit of A.U.S.A. Maher filed
1-11-74	Affidavit of THOMAS R. MAHER FILED.
1-11-74	Memorandum of the U.S. filed.
1-15-74	Defts reply memorandum on motion to dismiss filed
1-15-74	Copy of letter filed dated 11-14-74 from Chief Asst U.S. Atty. Korman to Prof. Lutsky re inquiries
1/20/74	Unsigned order of 11/18/74 submitted by Prof. Lutsky and letter of 11/20/74 from A.U.S.A. Korman to Judge Weinstein (re: order) filed
1/20/74	By WEINSTEIN, J. - Memorandum and Order filed that the U.S. should make available within 5 days the selective service file, etc.
1-26-74	By WEINSTEIN J - Opinion filed denying defts motion to dismiss ordering Selective Service files turned over to defense counsel.
11-26-74	Govts stay granted of above order for 14 days.
1-27-74	Stenographers transcript filed dated Nov. 1, 1974
1-27-74	Letter filed from defense counsel of Nov. 22, 1974 (received from Chamber re Martinez case 72 CR 810)
1-27-74	By WEINSTEIN J - Order filed in view of expressed intention by the US to seek review of this Court's prior orders by mandamus application is held in abeyance (see page 3 of letter for Order) <sup>parties</sup> notified.
1/27/74	Letter from Michael Tigar dated 11/25/74 and accompanying copy of letter from Hon. James L. Oakes filed
1/4/74	Letter from A.U.S.A. Korman to chambers dated 10/16/74 filed
2-13-75	Letter from AUSA Korman to chambers dated 2-7-75 filed.

DATE	PROCEEDINGS
12/6/74	Letter dated 12/3/74 filed from M. Tigar to Judge Weinstein with accompanying affidavit of Carmin R. Putrino
2-4-75	Letter filed dated 12-5-74 from deft's counsel Louis Lusky
2-13-75	Letter filed dated 2-5-75 from AUSA Korman to L. Lusky, Esq. (received from Chambers)
8-1-75	Notice of Motion filed , ret. Sept. 19, 1975, for dismissing the indictments, etc.
9-17-75	Govts memorandum filed in opposition to motion to dismiss.
9/19/75	Before WEINSTEIN, J. - Case called- Deft not present- Counsel present- Deft's motion to dismiss argued and decision reserved- Briefs to be submitted within 1 month
9-19-75	Miscellaneous papers filed received from Chambers -placed in criminal folder
9-26-75	Stenographers transcript filed dated 9-19-75.
10/20/75	Letter from Louis Lusky dated 10/17/75 filed-re: extension of time to submit further memorandums
10/20/75	By WEINSTEIN, J. - Order filed granting extension for 1 month (order on bottom of above letter) (parties notified)
11-18-75	Letter filed dated Nov. 17, 1975 received from Chambers from Louis Lusky requesting 2 week extension, etc.
11-18-75	By WEINSTEIN J - Order filed granting extension. Clerk to inform parties. (see notation of Judge Weinstein on bottom of letter from counsel)
12/3/75	Letter from Louis Lusky dated 12/2/75 filed re: request for extension of time to submit memoranda- Extension granted by Judge Weinstein on bottom of above letter
12/11/75	Govt's memorandum of law filed
12/15/75	Supplemental memorandum in support of motion to dismiss filed
1-6-76	By WEINSTEIN J - Memorandum and Order filed re issue of Plan for Achieving Prompt Disposition of Criminal cases, etc. The court would appreciate if the parties believe the issue is relevant, further communication regarding the applicability of the Plan or the subsequently adopted Plan of the Eastern District of NY under the Speedy Trial Act of 1974, etc. The parties should notify the court within 10 days of any intention to submit a brief and give an estimate of how much time they will require.
1-15-76	Letter filed dated Jan: 14, 1976 from Louis Lusky, atty for the deft requesting adjournment to Mar. 22, 1976. Extension granted.



DATE	PROCEEDINGS
-20-76	Letter filed dated Jan. 16, 1976 from Asst. U S. Atty Maher received from Chambers re deft (ret'd to Chambers as instructed)
6/26/76	Letter from Louis Lusky dated 3/20/76 and accompanying request for discovery and inspection filed
-26-76	Motion filed for order requiring compliance with defts request for discovery and inspection of grand jury minutes, etc. (ret. May 6, 1976 at 9:30 am) forwarded to Chambers.
/5/76	Memorandum in opposition to above motion filed
6-6-76	Before WEINSTEIN J - case called - deft & counsel Louis Lusky present - Defts motion for discovery and inspection argued - decision reserved - Hearing held as to the admission of Mr. Lusky and concluded - Court finds that Mr. Lusky was admitted in 1939 - Clerk to prepare Order.
6-6-76	Petition for Writ of Certiorari etc. filed received from Chambers.
6/10/76	Letter from Louis Lusky dated 5/6/76 filed
6-11-76	Stenographer's transcript dtd 5-6-76 filed.
/12/76	Voucher for expert services filed (court reporter)
-16-76	Letter filed dated May 14, 1976 from Louis Lusky, atty for the deft. and letter filed dated April 23, 1976 from Louis Lusky, atty for the deft re motions for discovery & inspection; production of Grand Jury Minutes etc.
6-17-76	Letter of June 16, 1976 with Memorandum concerning Govts Response to Discovery Order, filed (rec'd from Chambers) from counsel Louis Lusky.
-17-76	Memorandum filed received from Chambers signed by Judge Weinstein stating that based on the defts letter of June 16, 1976 and all documents and prior proceedings, the matter is deemed submitted. Counsel have 14 days to submit any additional material. Clerk shall so notify the parties.
6-23-76	Letter dated June 10, 1976 received from Chambers from AUSA Maher and affidavit of Murray Stein, Esq. filed. <sup>and motion</sup>
7/16/76	By WEINSTEIN, J. - Order to dismiss the action with prejudice. filed.
-26-76	Letter filed dated July 23, 1976 from Thomas Maher, Asst. US Atty to Judge Weinstein (forwarded to Chambers)
7-30-76	Govts Notice of appeal filed.
7-30-76	Docket entries and duplicate of notice mailed to the court of appeals
7-30-76	Letter to Judge Weinstein dated July 30, 1976 from AUSA Korman filed listing certain documents to be filed and entered on the docket; Affidavit of Thomas Maher of 11-11-74; Memorandum of Law



## CRIMINAL DOCKET

DATE	PROCEEDINGS
	of Govt dated Nov. 11, 1976; Memorandum of Law filed Oct. 25, 1974; Copy of transcript of proceedings of 9-20-74; copy of affidavit of debt on May 6, 1976; copy of letter of the debt dated 9-25-72.

MEMORANDUM AND ORDER  
OF THE DISTRICT COURT

JULY 16, 1976

1

This is but one of tens of thousands of cases carried in the limbo of federal courts' fugitive files. Young men indicted for failure to carry out their obligations under the Selective Service Laws during the Vietnam Conflict are scattered across the face of the earth--like abandoned weapons corroding and useless to this country. The defendants refuse to cooperate with the government by returning to be tried. The prosecution does nothing to compel their presence. The government, like so many of us, would prefer to forget Vietnam and its legacy. Since, however, the cases on this court's docket represent real people whose present lives are vitally affected by these pending criminal cases, courts may not indulge in the luxury of disregarding the issue when it is properly raised by motion, as it now has been.

The question before us is whether, as to this defendant in this case, the rules respecting speedy trials have been violated. For the reasons indicated below we hold that a speedy trial for this defendant is no longer possible and that, accordingly, the indictment must be dismissed.

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In 1972, the government indicted Sidney Salzmänn for failure to appear for a pre-induction physical and for induction. 50 U.S.C. App. 462(a). Salzmänn, a resident of Israel, had conducted a substantial correspondence with the government prior to the indictment in an effort to avoid just such an event. He had informed the government repeatedly that financial constraints prevented him from making the journeys for the physical or for induction. Instead of informing him of travel assistance available to him, the government treated him as a draft evader, indicted him, and allowed the indictment to lie fallow for four years.

The passivity that has characterized treatment of Salzmänn requires analysis of whether the government has failed to make the effort to procure his presence for trial required by the various Speedy Trial Plans in effect since 1971 and by the Speedy Trial Clause of the Sixth Amendment. This inquiry has become crucial since, due to the delay in bringing Mr. Salzmänn to trial, the United States Attorney's Office is no longer able to afford him two alternatives to prosecution that it has offered many others accused of draft evasion: the institution of an all-volunteer

army has made submission to induction impossible and the termination of the amnesty program has removed community service work as an alternative.

I. FACTS

Sidney Salzman faithfully kept the draft board informed of his status and residence from the time he registered by mail for the draft in 1964 while he was temporarily residing in Israel. He advised the board of his return to the United States in 1965, his enrollment at Queens College in New York, his marriage, and his entry into rabbinical studies in 1969. Accordingly, in 1969 he was classified IV-D as a divinity student, a deferment that would have ripened into a draft exemption had he completed his studies. In December of 1969 he advised the local draft board that he had moved to Jerusalem, Israel. As a result, he was classified I-A, and ordered to report for a physical examination on May 3, 1970, in Jamaica, New York, or at an army facility outside the United States. In response to an inquiry by Mr. Salzman, the board gave him the option of reporting to Livorno, Italy on May 27, 1970, for pre-induction processing. On April 30, 1970, Mr. Salzman wrote the Local Board to explain why he had discontinued his rabbinical work



and to inquire whether he would still be eligible for a IV-D classification if he resumed his studies. He requested a speedy reply before his scheduled physical in Italy. He was advised to have a school submit verification of his student status and to report for the physical examination as scheduled.

Mr. Salzmann did not report for the physical examination in Italy and he informed the local board that his failure "to show up at the physical was. . . due to the shortage on my part of the necessary Dollars required to undertake such a trip." His letter elaborated on his financial inability in some detail. Nevertheless, the board ordered him to report for induction at Fort Hamilton, New York on January 18, 1971. In early January Mr. Salzmann informed the board that he still did not have adequate means to travel abroad. He also explained that his departure from the United States and residence in Israel was not a means of avoiding military service. He told the board that he expected to be required to serve in the Israeli Army in the near future and expressed the hope that such service would eradicate any legal difficulties arising from his draft status in the United States. His letter read in part as follows:

Furthermore, I wish to bring to the attention of the Board that my wife and I, upon coming to Israel, have decided to make our permanent home here. This decision was the culmination of many years of education and training in this direction and was, I believe, a perfectly natural and legitimate one on our part. We came here not with the desire to escape our former obligations and ties, but, rather, to enter into new ones, closer to our hearts, here in our ancient homeland, Israel.

Having made the decision to remain here I will be required in the near future to serve in the Israel Defence Forces, an act which I consider [sic] to be my personal duty as a Jew.

I therefore appeal to the Board to reconsider my case and grant me an extension until such time as I will be inducted into the Israel Defence Forces, at which time I hope my case can be closed legally.

He wrote again in 1971, to remind the board that he had never asserted an intention not to comply with his obligation to report for induction, but had instead informed the board of his financial inability to make an overseas trip. Despite his repeated explanations that finances prevented him from traveling to either the point of physical examination or induction, the government never tendered any travel assistance, even though there was a regulation formalizing the existence of such assistance from June 14, 1971, approximately a year before Mr. Salzmann



was indicted. Local Board Memorandum No. 73, Par. 7(a) (1) (1971), 4 Sel. Serv. L. Rep. 2190:2, stated that the military may provide transportation from the United States air base closest to the overseas residence to the processing center.

On February 3, 1971, the local board filed a delinquent registrant report referring Salzman for prosecution. Nearly seventeen months later, in June of 1972, Mr. Salzman was indicted for his failure to report for a physical examination and induction.

Defendant wrote the Assistant United States Attorney to explain once again that lack of money prevented him from appearing. He had not run away from his American military responsibilities, he said, but to the contrary, had always kept his board informed of his whereabouts. He further explained that his actions were a result not of a flight from responsibility but

the culmination of many years of Zionist training. . . .I therefore consider it an insult to treat my case as if it were of one who ran away at the last moment to a neighboring country or one who deserted the Army. On the contrary, I did not run away from America but went to Israel for possitive [sic] reasons.

He stated again that he expected to serve in the Israeli Army and hoped that that would change his eligibility for service in the American Army. As he anticipated, Mr. Salzman did serve in the Israel Defense Forces.

Under a procedure approved by the Second Circuit in United States v. Weinstein, 511 F.2d 622, 629 (2d Cir. 1975), Mr. Salzman, although still residing abroad, asked Professor Louis Lusky to represent him. A motion to dismiss was then heard. Evidence, including the full selective service file, was introduced. Briefs and affidavits filed in related selective service cases were deemed before the court. See United States v. Lockwood, 386 F. Supp. 734 (E.D.N.Y. 1975).

## II. LAW

Before analyzing the Sixth Amendment right to a speedy trial, it is appropriate to first discuss the rights attaching to defendants under the series of Speedy Trial Plans that have been in effect while Salzman has been under indictment. In some ways the Plans have expanded the constitutional guarantees and they provide an independent basis for decision permitting avoidance of the constitutional



issue. Ashwander v. TVA, 297 U.S. 288, 346-48, 56 S. Ct. 466, 482-84, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). Neither party has raised the issue of whether the various Speedy Trial Plans were validly adopted. Their validity, therefore, will be assumed for the purpose of examining Salzmann's claims. Following analysis of the Speedy Trial Rule issues we turn to a discussion of the Sixth Amendment right. We then consider whether this is an appropriate case to invoke the Federal Rules of Criminal Procedure Rule 48(b) power to dismiss for unnecessary delay by the government. Finally, we briefly consider the special speedy trial statutory requirements applicable to selective service cases.

#### A. Speedy Trial Rules

Enthusiasm for Speedy Trial Plans that would define with some precision the outer limits of permissible delay grew in the sixties as trial delays, attributable to many factors, were increasing dramatically. The Administrative Office of the United States Courts began in 1963, to keep statistics on the time that elapsed between the filing of the criminal information or indictment and the final disposition at the district court level. The chart below

indicates that the length of the median time interval from filing to disposition climbed fairly steadily from 1963 to 1972, more than doubling during that period.

TABLE 54-United States District Courts criminal defendants disposed of showing median time interval from filing to disposition fiscal years 1963 and 1967-1975

Type of disposition and median time interval	Fiscal years									1975
	1963	1967	1968	1969	1970	1971	1972	1973	1974	
Total.....	31,403	31,535	31,813	32,796	36,356	41,615	42,516	46,721	46,513	48,244
Median (months).....	1.6	2.5	2.9	2.5	3.2	2.9	3.4	3.9	3.8	3.6

NOTE: Excludes District of Columbia and the territories of Canal Zone, Guam and Virgin Islands.

1975 Annual Report of the Director of the Administrative Office of the United States Courts 264, Table 54. They are median figures; delay in thousands of cases was and is many months greater.

Part of the slight decrease in delay in the last few years has been attributed to the various Speedy Trial Plans in effect. *Id.* at 265-66. But part is also due to the decrease in selective service prosecutions. As the Director of the Administrative Office noted:

The number of months from filing to disposition of a defendant has been decreasing, primarily as a result of the decline in the number of Selective Service Act cases, which have a high number of fugitive defendants. These cases when disposed of generally have a large span of time from filing to disposition.



Id. at 265.

The lengthening of delays in the 1960's is also a consequence of a continued and substantial rise in the number of cases, both criminal and civil, filed in the district courts. It is noteworthy that between 1960 and 1970, the number of criminal cases filed rose by approximately one-third. Id. at 189, Table 13. Courts were ill-equipped to deal with the delay this burgeoning caseload entailed, particularly since there has been no equivalent increase in judgeships. Id. at 188.

The Supreme Court had dealt with the Speedy Trial Clause of the Sixth Amendment only infrequently, most of the decisions having been handed down in the last two decades. Lower courts were frustrated in applying the Clause not only because of the paucity of appellate rulings but also because of the nature of the guidance. Until the watershed decision in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L.Ed.2d 101 (1972), the Court dealt with the cases on an ad hoc basis, making no attempt to lay down detailed guidelines. In Barker the Court announced various balancing factors that must be weighed in deciding whether the right has been violated. Valuable as such a sophisticated test

is, however, it reduces predictability and increases problems in decision making for the government, defendants and courts.

The House Report on the Speedy Trial Act of 1974 noted the need for legislation in order to enforce the Sixth Amendment.

The [Judiciary] Committee finds that the adoption of speedy trial legislation is necessary in order to give real meaning to that Sixth Amendment right. Thus far, . . . the decisions of the Supreme Court [have not provided] the courts with adequate guidance on this question.

The Supreme Court has held that the right to a speedy trial is relative and depends upon a number of factors. A delay of one year in some instances has been interpreted as prima facie evidence of a denial of the right. However, in others, a delay of up to eighteen years has been held not to violate the Sixth Amendment. In its 1972 decision, *Barker v. Wingo*, 407 U.S. 514, the Court stressed four factors in determining whether the right to a speedy trial had been denied to a defendant: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. The task of balancing these factors and arriving at a conclusion which is fair in all cases is a difficult task. It provides no guidance to either the defendant or the criminal justice system. It is, in effect, a neutral test which reinforces the legitimacy of delay.

With respect to providing specified time periods in which a defendant must be brought to trial, the Court in *Barker* admitted that such a ruling would have the virtue of clarifying when the right is infringed and of simplifying the courts' application of it. However, the Court said:

But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. *Id.* at 523.

H. R. Rep. No. 1508, 93d Cong., 2d Sess., 1974 U. S. Code Cong. & Admin. News 7401, 7404-05.



Despite the Supreme Court's hesitancy to lay down detailed rules, lower courts have not felt so constrained. During the entire time Salzmann has been under indictment, the Eastern District of New York has operated under court-promulgated speedy trial rules. The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases were effective as of July 5, 1971. Mr. Salzmann was indicted almost a year after, in June of 1972. Since his indictment two other sets of rules have been in force. On April 1, 1973, the Plan for Achieving Prompt Disposition of Criminal Cases, which was passed pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure, went into effect. And from September 29, 1975, the Interim Plan of the United States District Court for the Eastern District of New York Under the Speedy Trial Act of 1974, has governed court practice in criminal cases. As of July 1, 1976, a Transitional Plan was effective.

Each of these sets of rules contains a series of similarly worded relevant provisions. Each requires the government to be ready for trial by six months or less after indictment unless an enumerated exception applies. All

sets of rules also permit an exception for delay due to a defendant's unavailability. Before singling out these and other pertinent provisions and analyzing them, it will be helpful to review the history of these sets of speedy trial rules. An understanding of their genesis and of the goals of the courts and judicial bodies that approved them assists in the application of specific rules.

1. History of Speedy Trial Rules

- a. ABA Standards

The texts of the four sets of rules that have been in effect in the Eastern District since 1971 share a common origin. The basic structure of the plans and much of the language was first available in the "Standards Relating to Speedy Trial," a report of the ABA Advisory Committee on Criminal Trial. The tentative draft of the Standards, which was published in May of 1967, was approved by the ABA House of Delegates in February of 1968.

The drafters of the Standards, like those of all subsequent Plans, recognized that dual interests are at stake in speedy trial rules. A speedy trial is not only in the interest of the defendant, but also in the interest of the public. The Standards "effectuate the right of the



accused to a speedy trial and the interest of the public in prompt disposition of criminal cases. . . ." A.B.A. Standards Relating to Speedy Trial 1.1 (Approved Draft 1968).

Apart from the express recognition of the benefits of a speedy trial to the public and defendant, the ABA committee left a legacy in the formulation of rules far stricter than the constitutional requirements as defined by the then current case law. It recommended that courts adopt a maximum delay period, even for cases of non-incarceration, and rejected suggestions that the defendant show the government's delay had been purposeful or oppressive. Pollard v. United States, 352 U.S. 354, 361-62, 77 S.Ct. 481, 486, 1 L.Ed.2d 393 (1957), or that it have prejudiced the defendant, United States ex rel. Solomon v. Mancusi, 412 F.2d 88, 90-91 (2d Cir.), cert. denied, 396 U.S. 936, 90 S.Ct. 269, 24 L.Ed. 2d 236, (1969).

This ABA approach relied upon an assumption not previously recognized--that any delay is prejudicial to a defendant and that a delay of a specified period is so manifestly prejudicial as to require dismissal of the indictment with prejudice absent an acceptable excuse. The Committee's

adoption of absolute discharge of the defendant barring any future prosecution for the offense charged was a fairly radical proposal, but "the only effective remedy" in the view of the Committee. A.B.A. Standards Relating to Speedy Trial, Commentary to 4.1 (Approved Draft 1968). See United States v. Furey, 514 F.2d 1098, 1105 (2d Cir. 1975). But cf. Amsterdam, Speedy Criminal Trial: Rights and Remedies, 27 Stan. L. Rev. 525, 537 (1975). Furthermore, the abandonment of any requirement that the defendant demand his right to a speedy trial shifted even more of the responsibility for a prompt trial to the government. See, e.g., United States v. De Masi, 445 F.2d 251 (2d Cir.), cert. denied, 404 U.S. 882, 92 S.Ct. 211, 30 L.Ed.2d 164 (1971) (3-1/3 year delay plus 4 year preindictment delay not improper). A defendant's silence even over a prolonged period would not bar a motion to dismiss the indictment on speedy trial grounds. The Standards permitted the government to claim that the defendant had waived the speedy trial claim only after the defendant pled guilty or proceeded to trial.

b. 1971 Second Circuit Rule.

It was not long after their publication that the Standards bore fruit in the Second Circuit. The Court

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of Appeals in 1971, acting on its own initiative and relying on its interpretation of its own supervisory powers and 28 U.S.C. § 332, issued the Rules Regarding Prompt Disposition of Criminal Cases in federal courts at the close of an en banc decision rejecting a state prisoner's habeas corpus petition. United States ex rel. Frizer v. McMann, 437 F.2d 1312 (2d Cir. 1971). The petitioner had pressed a Sixth Amendment speedy trial claim after ten and a half months had elapsed between indictment and trial. Although the court rejected his claim, sitting as the Circuit Council it enunciated Rules for the federal district courts of the Circuit. The Rules went far beyond the constitutional right in some respects.

As suggested by the Standards, the Rules prescribe a maximum period for prosecutorial delay, and eschew any requirement that a defendant show prejudice or make a timely demand in order to invoke the protection of the Rules. The government's failure to abide by the Rules warrants dismissal of the indictment. But in two significant ways the Rules are narrower in scope than the Standards. The Rules proscribe government delay alone and they permit a six month delay.

The ABA Standards were drafted to cover trial delay generally, not just delay due to prosecutorial inaction. Thus, the Standards also gave relief to defendants whose trials were delayed by such factors as court congestion. In contrast, the Second Circuit's Rules focused primarily, if not exclusively, on delay due to the conduct of the prosecution, despite the fact that only a limited number of reasons for delay cited by the court are attributable to the prosecution. United States v. Infanti, 474 F.2d 522, 528 (2d Cir. 1973). In the course of the Frizer opinion the Second Circuit summarized 18 major causes of delay in criminal cases in New York State, four of which were due to the prosecution. The court reported a New York Judicial Conference finding that personnel shortages in district attorneys' offices, part-time assistant district attorneys, part-time district attorneys in some counties, and adjournments sought because of non-appearance of key witnesses and police officers were the primary reasons for state court delay attributable to the prosecution. United States ex rel. Frizer v. McMann, 437 F.2d 1312, 1314-15 (2d Cir. 1971). Only the first and last of these reasons would be



applicable to delays by the United States. In shifting the emphasis from trial delay to government readiness for trial, and at the same time, adopting the ABA remedy for failure to abide by the rules, i.e., dismissal, the Second Circuit placed a significant affirmative duty on the government. This duty is of particular import to Mr. Salzman since there is no indication of any active resistance on his part to prosecution. He notified the government that financial restrictions alone made it impossible for him to appear, both for induction and for prosecution.

The other significant change from the Standards to the Rules Regarding Prompt Disposition was the choice by the Second Circuit of a six month limitation on delay. The drafters of the Standards had refrained from selecting a time frame; but six months was at the outside of the range of figures outlined in the Commentary to Rule 2.1. The President's Crime Commission proposed that the period from arrest to trial be not more than four months. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 155 (1967). Nevertheless, the Rules are consistent with

the Standards in designating a period beyond which further delay will be considered inherently prejudicial.

The Circuit Council considered the heavy burden it placed on the government necessary in light of the public interest in prompt disposition of cases.

The public interest requires disposition of criminal charges with all reasonable dispatch. The deterrence of crime by prompt prosecution of charges is frustrated whenever there is a delay in the disposition of a case which is not required for some good reason. The general observance of law rests largely upon respect for the process of law enforcement. When the process is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded.

Statement of the Circuit Council to Accompany Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, New York Federal Court Rules 4-25.

c. Federal Rules of Criminal Procedure Rule 50(b) Plan

Rule 50(b) of the Federal Rules of Criminal Procedure inaugurated the first national effort at speedy trial rulemaking. Drafted by the United States Judicial Conference, and submitted to Congress by the Supreme Court, the Rule has been in effect since January, 1973. It directs each district court to "prepare a plan for prompt disposition of criminal cases." Pursuant to Rule 50(b), the Committee on the Administration of the Criminal Law of the United States Judicial Conference prepared a Model Plan which was



submitted by the Administrative Office of the United States Courts to each district court, but each district had the option of preparing its own plan.

The Eastern District Plan, which became effective on April 1, 1973, contained only minor variations from the Second Circuit Rules then in effect. As a result, the Eastern District Plan imposed a stricter standard on the government than the Model Plan. For instance, the Model Plan contained no mandatory sanction for failure to provide a speedy trial, other than the release of incarcerated defendants from custody. Rule 50(b) Model Plan § 4, Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., at 219 (1973). In contrast, the Eastern District Plan provided for dismissal with prejudice when an unexcused delay exceeded six months. While the Model Plan suggested a six months maximum delay period, it allowed the court to grant continuances whenever it was satisfied that the "interests of justice" would be served. Rule 50(b) Model Plan § 3, *id.* at 218-19. The Eastern District Plan contains specific exceptions to the six months rule, and thereby, severely restricts the court's discretion. All 50(b) Plans

are similar, however, in "that they place an affirmative duty on the government to bring the accused to trial." United States v. Rodriguez, 497 F.2d 172, 175 (5th Cir. 1974).

The Subcommittee on Crime of the House Judiciary Committee had deferred drafting its own speedy trial rules until it could assess the implementation of the Rule 50(b) Plans. Relying heavily on a critical report prepared by Professor Daniel J. Freed and Mr. Andrew H. Cohn of Yale Law School, the Subcommittee concluded that "Rule 50(b) and the Model Plan adopted by many district courts is an inadequate response to the need for speedy trial, in that it encourages the perpetuation of the status quo." H. R. Rep. No. 1508, 93d Cong., 2d Sess., 1974 U. S. Code Cong. & Admin. News 7401, 7406. The Freed report had reviewed 92 district plans. In summary it found that

. . . circuits differ in the degree of uniformity among their district plans, with most circuits not enforcing any strict uniformity; the goal of the Model Plan that the suggested time limits be shortened by the districts is largely unrealized; the Model Plan grants broad discretion with respect to the extensions of time limits--a pattern which is followed in most districts. The report further indicates



that a comparison of actual court proceeding time and the Rule 50(b) plans for 20 districts shows that a strong correlation exists between the time limits adopted in the districts and the prevailing norm at the time of adoption.

Id. As a result of disappointment with Rule 50(b), Congress adopted the Speedy Trial Act of 1974.

d. Speedy Trial Act of 1974.

In all but one respect the Speedy Trial Act of 1974 imposes a much heavier burden on the government to insure a prompt trial than any of the Plans that have been in effect in the Eastern District. The Act shortens the time span of permissible delay generally, not just prosecutorial delay. But at the same time the Act introduces remedial flexibility by allowing a court to dismiss an indictment with or without prejudice as circumstances indicate.

The limitation of the period of acceptable delay and the increased scope of the Act indicate Congress' strong bias against delay in bringing defendants to trial and its concomitant willingness to place a heavy burden on the government, both the prosecutor and the court, to insure a speedy trial. Specifically, the Act provides that an indictment must be filed within thirty days from arrest or service of summons. The arraignment must be within ten days following indictment

and trial must be within sixty days thereafter. To allow the courts to fully comply with this 100 day time period, however, the Act does not become fully operative until five years after it takes effect. As a result, the six month interval permitted under the 50(b) Plan will be only gradually reduced to 100 days.

An even more impressive indication of the strength of Congressional disapproval of delay is the return to the broad scope of the A.B.A. Standards. The Speedy Trial Act does not merely require prosecutorial readiness like the Second Circuit Rules and the 50(b) Plan but it mandates prompt trials generally. See United States v. Furey, 514 F.2d 1098, 1101 (2d Cir. 1975). Delays due to the court and the defense are dealt with legislatively, along with prosecutorial delay. In fact, the Act explicitly forbids a judge from granting a continuance due to court calendar congestion. 18 U.S.C.A. § 3161(D)(8)(c). The Act also takes a much firmer line against the prosecution than previous plans by, for example, removing failure to obtain available witnesses as an excuse for delay. Id. These two provisions are examples of the Congressional decision to



restrict the excuses for what may be termed neutral factors like court congestion; they are no longer acceptable. In its discussion of its rejection of calendar congestion and unobtained witnesses as excuses for delay, the House Report on the bill eventually passed as the Speedy Trial Act noted the hard line it was taking against what it termed "institutional delay." It reasoned that

. . .the nature of the concept of speedy trial is one which recognizes that institutional delays occasioned by poor administration and management can work to the detriment of the accused. Placing a prohibition on the granting of continuances for these reasons serves as an incentive to the courts and the Government to effectively utilize manpower and resources so that defendants may be tried within the time limits provided by the bill.

H. R. Rep. No. 1508, 93d Cong., 2d Sess., 1974 U. S. Code Cong. & Admin. News 7401, 7426. See Steinberg, Right to Speedy Trial: The Constitutional Right and its Applicability to the Speedy Trial Act of 1974, 66 J. Crim. L. & Criminology 229, 235 (1975).

To balance the breadth of the Act's prohibition against delay, the remedial section of the Act explicitly provides courts with greater flexibility than any of the

predecessor Plans and perhaps even greater flexibility than is allowed by the Constitution. See Strunk v. United States, 412 U.S. 434, 440, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56 (1973); H. R. Rep. No. 1508, 93d Cong., 2d Sess., 1974 U. S. Code Cong. & Admin. News 7401, 7430. But see Amsterdam, Speedy Criminal Trial: Rights and Remedies, 27 Stan. L. Rev. 525, 535-37 (1975). The Act requires a court to dismiss an indictment after a defendant fails to be indicted or tried within the time set by the Act. But the dismissal may be either with or without prejudice. In making the determination as to which sanction is appropriate, a court is required to consider "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice." 18 U.S.C.A. § 3162(a)(1)(2).

Although the Act does not become fully effective until 1979, it requires the adoption of Interim Plans. The Interim Plan for the Eastern District of New York was effective September 29, 1975. With the exception of some areas that were not covered in previous plans, such as



sentencing and juvenile proceedings, the Interim Plan is virtually identical to the 50(b) Plan in effect in the Eastern District since 1973.

A Transitional Plan, effective July 1, 1976, has also been adopted pursuant to the Act. It grants a certain degree of discretion to accept waivers, but its details are of no pertinence since the court has, under the terms of the 1976 Plan, found no waiver by Salzmann and no valid legal reason for prosecutorial delay. Since so little time has elapsed under the Transitional Plan we treat it, for the purposes of this discussion, as if it were identical with the Interim Plan.

## 2. Application of Speedy Trial Rules to Defendant

All applicable Plans that have been in effect since Salzmann was indicted contain similarly worded provisions that pertain to the circumstances surrounding the delay in the adjudication of his case. The Second Circuit Rules, the 50(b) Plan, and the Interim Speedy Trial Plan contain (1) the basic standard that an indictment must be dismissed if the government is not ready for trial within

six months following indictment, (2) an exception to the basic standard when the government cannot obtain the presence of an "unavailable defendant by due diligence, (3) a description of the efforts the government must make to obtain a defendant's presence in a situation that is somewhat analogous to that of the unavailable defendant, i.e., when the defendant is imprisoned elsewhere, and (4) an exception to the basic standard when there are exceptional circumstances or excusable neglect.

a. Government Readiness Requirement

Any analysis of whether or not Salzmann has been deprived of his right to a speedy trial as defined by our local Plans must begin with the rule which sets down the basic proposition that unless there is an applicable enumerated exception elsewhere in the rules, the indictment must be dismissed with prejudice if the government is not ready for trial within six months from the start of criminal proceedings. The Second Circuit Rules, which were in effect when Salzmann was indicted, embody this standard in Rule 4. It reads as follows:



4. In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

This basic government readiness rule is contained in Rule 4 of the 50(b) Plan and Rule 5 of the Interim Speedy Trial Plan, which are identical to each other. They read as follows (numbers in brackets refer to Interim Speedy Trial Plan):

5.] *All Cases: Trial Readiness and Effect of Non-Compliance.*

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5 [6], the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

These Plans would appear on their face to differ from the Second Circuit Rules in two noteworthy respects. First, they state that the dismissal of an indictment for unexcused government delay shall be with prejudice. But, court interpretation of the Second Circuit Rules had established that dismissal under the Rules was also with prejudice. Hilbert v. Dooling, 476 F.2d 355 (2d Cir.) (en banc), cert. denied, 414 U.S. 878, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973). Second, the two more recent Plans contain an excusable neglect provision that permits a court to allow the government to proceed to trial immediately despite the fact that no enumerated exception can be cited to toll the six-month time limit on delay. This escape hatch will be discussed in more detail later, along with similar provisions in the Plans. See II A 2 d, infra.

Since Salzmänn was indicted in June of 1972, the Second Circuit Rules required the government to be ready for trial by December of 1972. When the United States Attorney in the Eastern District of New York is ready for trial it is the United States Attorney's practice to communicate that readiness by issuing a written notice of readiness.



This practice was made mandatory by the Second Circuit in United States v. Pierre, 478 F.2d 386 (2d Cir. 1973).

The court in Pierre stated it would be

inconsistent with the intent of the Circuit Council. . . and with sound public policy, to free the Government from the responsibility of communicating its readiness for trial to the court.

478 F. 2d at 388. Government issuance of a notice of readiness eliminates the necessity for an evidentiary hearing to determine whether in fact the government was ready for trial within the six-months period in those cases which go to trial after the period has run. The notice also assists district courts in control of their calendars. And, ultimately, it is the district courts' ability to control their calendars efficiently that will determine if the objectives of the Rules can be achieved. The government has yet to file a notice of readiness in the Salzmann case. As a result, unless the six-month period is tolled by one of enumerated exceptions or the government's neglect is excusable, the indictment must be dismissed. See, e.g., United States v. Flores, 501 F.2d 1356, 1358-59 (2d Cir. 1974); United States v.

Favaloro, 493 F.2d 623, 624 (2d Cir. 1974); United States v. Scafo, 480 F.2d 1312, 1318 (2d Cir.), cert. denied, 414 U.S. 1012, 94 S.Ct. 378, 38 L.Ed.2d 250 (1973).

b. Requirement that Government Exert Due Diligence to Obtain Unavailable Defendants

All three Plans toll the six months period in which the government must be ready for trial when the delay is occasioned by the unavailability or absence of the defendant. The Second Circuit Rules embody this exception in Rule 5(d), which reads as follows:

5. In computing the time within which the government should be ready for trial under rules 3 [incarcerated defendants] and 4, the following periods should be excluded: . . .

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown and in addition he is attempting to avoid apprehension or prosecution or his location cannot be determined by due diligence. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence. . . .

The 50(b) Plan and the Interim Speedy Trial Act Plan have an almost identical exception in Rules 5(d) and 6(d), respectively. The only major variation is the shortening of the definition of an absentee to read:



A defendant should be considered absent whenever his location is unknown.

In short, the rules define an absent defendant as one whose location is unknown to the government. Since Salzmänn diligently kept his draft board and then the United States Attorney informed of his address in Israel, the Plans' definitions prevent him from being numbered among absent defendants.

The other provision of 5(d) [6(d)] pertains to defendants whose location is known by the government and yet whose presence the government is unable to obtain by due diligence. Such defendants are labelled unavailable. The Transitional Speedy Trial Act Plan effective from July 1, 1976, adds a further elaboration to the definition of unavailability. It reads

A defendant . . . shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

Rule 10(a)(3)(B) There is no indication in the record that Salzmänn has resisted any attempts the government has made to produce him for trial. There is no record that the.

government has made any effort, beyond indicting the defendant, to procure Salzmänn's presence. The crucial phrase in the definition of unavailability remains, therefore, the due diligence clause of the predecessor Plans. Because the government has not demonstrated that it could not have obtained Salzmänn's presence in the United States, both before and after indictment, the government's failure to do so amounts to a failure to exercise due diligence. As a result, this exception cannot be relied upon by the government to toll the requirement that it be ready for trial within six months of indictment.

In almost every piece of the correspondence that Salzmänn had with the government following the scheduling of a pre-induction physical, he alluded to his financial inability to travel abroad. In his letter of December 17, 1970, for example, he explained his inability

to show up at the physical was. . . due to the shortage on my part of the necessary Dollars required to undertake such a trip. This is also the reason for my continuing failure to appear at said physical examination.



Although I work at present I get paid only in local currency and a trip abroad must be paid for in Dollars or else an exorbitant tax is levied. The money that I make is barely enough to support my wife and me and we find it quite impossible to save enough money in the immediate future for such a large expense.

He concluded the letter with the plea, futile as it turned out, that the government "take my situation into account."

On January 6, 1971, Salzmann answered his notification to report for induction with the following explanation:

I wish to inform the Board that since I am in Israel I have no means at my disposal to appear at the Examination and Entrance Station at fort Hamilton at the time and date specified.

And again, he wrote on February 13, 1971:

Please be advised that at no time did I assert that I have no intention of complying with my obligation to report for induction. I did, however, mention that my financial situation does not at this time allow me a trip to the United States.

Despite Salzmann's repeated explanations that finances prevented him from leaving Israel for either his military obligations or court proceedings, the government neglected to inform him of the travel assistance it had at its disposal. On June 14, 1971, approximately a year

before the indictment, the rules for processing overseas registrants were significantly liberalized by a revision of Local Board Memorandum No. 73. 4 Sel. Serv. L. Rep. 2190. The 1971 revision required that overseas registrants be provided with a Transmittal Letter for Delivery for Induction informing them of the assistance available to transport them between their overseas residence and the overseas preliminary processing point, and between the preliminary processing point and the continental United States Examining and Entrance Stations. The Memorandum instituted a flexible system of aid combining military and commercial transportation. It ordered the Army Area Commander in whose jurisdiction the overseas registrant resided to

(2) Authorize transportation of registrant from United States military air base closest to his place of overseas residence to collection point if required.

(3) Advise registrant of the name and location of the military air base and flight information for his transportation to the collection point and furnish him necessary travel authorization.

Local Bd. Memo. No. 73, ¶ 7(b), 4 Sel. Serv. L. Rep.

2190:2.

If the



registrants [were] not found acceptable for induction into the Armed Forces during processing at the collection point [, then] registrants who were delivered to the collection point shall be authorized return air transportation when requested.

Id. ¶ 7(b) (7). Those registrants found acceptable for induction, however, would be provided

with necessary Travel Orders or MAC Transportation Requests for return to the continental United States and advice of particular flight arrangements.

Id. ¶ 7(b) (8). Once in the United States the registrants were to report to their appropriate local board, which would provide

- Transportation by commercial or other expeditious means . . . to . . . Armed Forces Examining and Entrance Station.

Id. ¶ 7(c) (2), (3). If the registrant failed

to qualify for induction into the Armed Forces [, then he] may elect to (1) be released from Armed Forces Examining and Entrance Stations or (2) request air transportation back to initial place of reporting for delivery or collection point established by the Army Commander of the area of jurisdiction. . . .

When the registrant elects to be returned overseas, the AFEES Commander will prepare Military Travel Authorization for return from Port of Aerial Embarkation to overseas point at which registrant reported to Army Area Commander for delivery for induction. AFEES Commander will also provide registrant with commercial transportation ticket or travel authorization furnished by aligned local board for his return to local board.

Id. ¶ 10.

In summary, the Memorandum provided a comprehensive, intricate system of transportation for overseas registrants like Salzmänn to and from processing points. It is true that the Memorandum went into effect after the initial dates for Salzmänn's physical examination and induction, but the Memorandum was nevertheless highly pertinent to him because of his continuing duty to report for pre-induction.

32 CFR 1628.10(b) (1972) provides in part:

Regardless of the time when or the circumstances under which a registrant fails to report for armed forces examination when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for armed forces examination to his local board and to each local board whose area he enters or in whose area he remains.



Even if the Memorandum had never existed, the government was probably under an obligation to provide travel assistance for needy Americans it ordered to return from residence abroad. A failure to do what is impossible negates mens rea. Cf. A.L.I. Model Penal Code § 2.01.

Admittedly, it was Salzmänn's duty to fulfill his military obligations. But it is very harsh not to give him necessary assistance in the performance of his duty, especially when he was not actively avoiding his obligations and when travel assistance in the form of free space on a military flight would have been relatively easy to provide. It is in the interests of both the country and the individual citizen that the government lighten the burdens it imposes on its citizenry whenever possible.

In another situation in which Americans have an obligation to their country, that is, appearance pursuant to subpoena, the government has taken pains to provide assistance to those living abroad. There is a statute ensuring that travel expenses will be tendered to Americans living abroad who are subpoenaed to appear as witnesses in the United States. 28 U.S.C. § 1783 .

In United States v. Danenza, 528 F.2d 390 (2d Cir. 1975),

tender of such expenses was a necessary predicate to a finding that a grand jury witness was in civil contempt for failure to comply with the subpoena. How much more important to tender travel expenses when it will allow the recipient to fulfill his military obligations or when it will ensure his constitutional right to a speedy trial.

The phrase "due diligence," if it is to have any meaningful content must at the very least embody the responsibility of the government to read its mail and respond intelligently. If the government has at its disposal a means of procuring a defendant's presence with a minimum expenditure of effort, and here the effort may only have entailed informing the defendant of an existing government program of travel assistance, then due diligence must require the government to make this effort. The government cannot complain of the defendant's continued unavailability when the government chooses not to employ means readily at its disposal to procure his presence. See United States v. Estremera, 531 F.2d 1103 (2d Cir. 1976) (government's mistaken reliance on deportation rather than extradition did not negate good faith). Cf. United States



v. Knight, 529 F.2d 594 (2d Cir. 1975) (period after defendant's location in Canada from disappearance to arrest in Florida excluded).

Instead of acknowledging its dereliction, the government has responded to Salzmänn's speedy trial rule claim as follows:

We . . . do not believe that a fugitive defendant may assert a claim that he has been deprived of his right to a speedy trial.

Letter of Assistant United States Attorney Thomas Maher, United States v. Sidney Salzmänn (Jan. 16, 1975). The government's response disregards the Rules' directive that the government use due diligence to try to obtain the defendant's presence. By stressing that the defendant is a fugitive, the government seeks to absolve itself from making any effort to procure his presence for trial. Rule 5(d) is specifically addressed to those situations in which the accused is a fugitive and places the burden of due diligence on the government nonetheless.

In cases preceding speedy trial plans, and even in cases preceding modern Supreme Court Sixth Amendment decisions, courts have held that circumstances did not justify delay when the accused was "unavailable" only because of the negligence of authorities in failing to pursue him, and not because of any deliberate evasion on the part of the accused. See, e.g., People v. Serio, 13 Misc. 2d 973, 181 N.Y.S.2d 340 (1958) ("mere failure of defendant to take affirmative action to prevent delay may not. . .be construed as a waiver. . .").

The government's failure to respond to Salzman in any meaningful way may be particularly egregious since this is a draft case. In a long line of cases covering diverse areas of the intricate draft laws and accompanying regulations, courts have required the government to inform draft registrants of their options and rights because counsel is almost never available prior to indictment. This has not only been true in instances of fairly esoteric provisions. e.g., Chernekoff v. United States, 219 F.2d 721, 723 (9th Cir. 1955) (government notice to registrant must inform him of his statutory right to summary of



information in his selective service file which might tend to defeat his request for a classification change); United States v. Dix, 4 Sel. Serv. L. Rep. 3051 (S.D. Ohio 1971), (requirement that Selective Service System must notify registrant if the job which he is performing is unacceptable for alternative service), but also when well-known, basic privileges are at stake, e.g., United States v. Turner, 421 F.2d 1251, 1255 (3d Cir. 1970) (local board must supply registrant with appropriate form or otherwise inform him of needed procedures when he makes known to local board desire to claim conscientious objector status); United States v. Moyer, 307 F. Supp. 613, 615 (S.D.N.Y. 1969) (requirement of 32 C.F.R. § 1621.11 imposing duty on local board to provide conscientious objector Form 150 interpreted as mandatory and fatal to indictment if not fulfilled); United States v. Sobczak, 264 F. Supp. 752 (N.D. Cal. 1966) (in ascertaining a conscientious objector claim local board may not limit it to specific, formalized claims).

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While the regulations and cases just referred to relate, in the main, to pre-indictment obligations of the government, a fortiori they apply to the post-indictment period. The government has an obligation, at the very least, to inform a defendant claiming lack of sufficient funds to travel to the place of trial, that the United States will advance his costs of transportation.

When the government's action in the Salzmänn case is compared to its handling of selective service prosecutions generally, its unresponsiveness to Salzmänn seems part of a pattern, rather than aberrational. Selective service cases are unique in the percentage of long term indictments pending due to the defendants' fugitive status. The table below shows a dramatic difference between Selective Service cases and other cases in terms of the number of defendants in fugitive status.



FUGITIVE DEFENDANTS IN CRIMINAL CASES PENDING  
ONE YEAR OR MORE IN THE DISTRICT COURTS  
AS OF DECEMBER 31, 1973 FOR SELECTED OFFENSES

Offense	Defendants in Cases Pending 12 Months or More	Fugitives Number Percent	
<u>Total, all offenses</u>	11,718	7,064	60.3
Total, 5 offenses	6,473	5,026	77.6
Percent of Total	55.2	71.1	--
Postal theft	142	87	61.3
Auto theft	156	98	62.8
Forgery	437	228	52.2
Narcotics	2,492	1,600	64.2
Selective Service Act	3,246	3,013	92.8

Administrative Office of the United States Court, 1974

Semi-Annual Report of the Director 53. Over 90% of the selective service defendants in cases pending a year or more were fugitives as of the end of 1973, as opposed to 64% of the narcotics defendants, the next highest category reported. The great disparity between selective service cases and others suggests that delays in enforcement of the selective service laws may have had a disproportionately unfair impact on this category of defendants. See generally National Advisory Commission on Selective Service, In Pursuant of Equity: Who Serves When Not All Serve? 19 (1967); Tigar & Zweben, Selective Service: Some Certain

Problems and Some Tentative Answers, 37 Geo. Wash. L. Rev. 510 (1969).

The high number of fugitives, and as a result, the long trial delays in selective service cases, are due in part to the government's systematic failure to exert the same amount of effort to procure the appearance of Selective Service inditees for trial as it exerts to procure the appearance for trial of persons charged with other federal felonies such as bank robbery, interstate kidnapping, and skyjacking. The court knows, both from its own records and from other judicially noticeable facts, that the government does make the most strenuous efforts to procure the appearance for trial of persons charged with non-Selective Service felonies of the types mentioned, and does not hesitate to seek the return of such persons through diplomatic efforts. This is true even when an extradition treaty does not cover the offense. See, e.g., Fiocconi v. Attorney General, 462 F.2d 475 (2d Cir. 1972), cert. denied, 411 U.S. 916, 93 S. Ct. 1543, 36 L.Ed.2d 307 (1973).



Professor Evans has described the numerous practical alternatives to extradition to which this country resorts in "Acquisition of Custody Over the International Fugitive Offender--Alternatives to Extradition: A Survey of United States Practice," 1964 British Yrbk Int'l L. 77 (issued 1966). She concludes that use of these informal measures to obtain fugitives from other nations is inevitable since the bilateral formal agreements upon which extradition is based cannot be expected to "meet all contingencies arising out of a fugitive's taking asylum abroad." Id. at 103.

In contrast, no serious effort has been made to locate and apprehend any of the allegedly fugitive Selective Service defendants who are on this court's docket or to procure their extradition by foreign nations. As recently as 1972, it was reported, and not denied, the government had not requested other governments to extradite or deport selective service indictees. See Note, Legal Status of American War Resisters Abroad, 5 N.Y.U.J. Int'l L. & Pol. 503, 522 (1972). The Justice Department admits that "no request has been made upon the Israeli Government for the extradition of fugitives who have been indicted for violation of our selective service statutes." Affidavit of

Murray R. Stein, Criminal Division, Dep't of Justice, in United States v. Salzmann, 72-CR-740 (June 2, 1976).

The question remains whether efforts by the government would have been so obviously futile as to excuse it from making them. The government has no legal right under present extradition treaties to demand extradition of the defendants from the countries in which most of them reside. Extradition treaties with Canada and Sweden do not require them to honor United States requests to return our military fugitives.

The extradition treaties presently in force between the United States and Canada do not include flight from military service in the list of enumerated, extraditable offenses. The only agreement between the United States and Canada regarding fugitives from military service is no longer in force. Between October 26, 1945 and April 28, 1952, the executive agreement entitled "Apprehension and Return of Deserters from Armed Forces" provided for cooperation between American and Canadian military authorities in "apprehending such offenders and returning them to the custody of the appropriate authority of the government."



from whose military service they have deserted or are absent without leave." Letter from Ray Atherton, Exchange of Notes at Ottawa, Canada, June 13 and October 26, 1945. [1945] A.D. No. 493, 6 Bevans 403.

The current extradition treaty between the United States and Sweden specifically excludes military offenses. The Convention on Extradition with Sweden Together with Related Protocol, October 21, 1961, Article V., which enumerates those circumstances under which extradition shall not be granted, reads in part:

4. When the offense is purely military.
5. If the offense is regarded by the requested State as a political offense or as an offense connected with a political offense.

[1961] 14.2 U.S.T. 1845, T.I.A.S. 5496.

Our treaty with Israel does not require that country to surrender Salzmänn either. Even though Israel does have a draft, its extradition treaty with us does not explicitly cover this offense. See Convention on Extradition Between the Government of the United States of America and the Government of the State of Israel, December 5, 1963, 14 UST 1707. Article 21 of the Israeli Extradition Act prohibits surrender for offenses other than those specified if a treaty requires enumeration, as does the Extradition Convention Between Israel and the United States.

Even if the federal government lacks the legal right to demand extradition, it may be required by the due diligence clause to request surrender of the defendants. Unless the asylum country has explicitly denied a request for extradition as a matter of comity (or a request for deportation, which would ordinarily have the same effect), it cannot be assumed that such a request would be denied--so that failure to make the request is failure to act with due diligence. United States v. McConahy, 505 F.2d 770 (7th Cir. 1974). Every nation has the sovereign power,



under international law, to extradite fugitives if it so elects. See Fiocconi v. Attorney General, 462 F.2d 475, 478 (2d Cir. 1972), cert. denied, 411 U.S. 916, 93 S.Ct. 1543, 36 L.Ed.2d 307 (1973); Chandler v. United States, 171 F.2d 921, 935 (1st Cir. 1948), cert. denied, 336 U.S. 918, 69 S.Ct. 640, 93 L.Ed. 1081 (1949); United States v. Sobell, 142 F. Supp. 515, 524 (S.D.N.Y. 1956), aff'd, 244 F.2d 520 (2d Cir.), cert. denied, 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed.2d 77 (1957). See also Mancusi v. Stubbs, 408 U.S. 204, 222-24, 92 S.Ct. 2308, 2317-18, 33 L.Ed.2d 293 (1972) (Marshall, J., dissenting). 6 Whiteman, Digest of International Law 727-28 (1968); Tate, Draft Evasion and the Problem of Extradition, 32 Albany L. Rev. 337, 355-57 (1968).

The most widely recognized ground for refusing to cooperate with another country's attempts to obtain an accused is the recently developed political offense exception. See Note, The Status of Political Fugitives and Refugees under United States Law, 2 B'klyn J. Int'l L. 264, 269 (1976). See generally 2 A Treatise on International Criminal Law 362 (M. C. Bassiouni & V. Nanda

eds. 1973) (military and political offenses generally not extraditable); Tate, Draft Evasion and the Problem of Extradition, 32 Albany L. Rev. 337, 355-57 (1968) (political offenses not extraditable). There is no reason to believe, however, that Israel would invoke this doctrine. From the record available so far, Salzman's refusal to appear for induction was not politically motivated, but rather the result of financial constraint. At no point did he state that he was protesting any policy of the government.

The Supreme Court has not ruled on the precise questions here involved--whether the federal government is obligated to seek, through diplomatic channels, the return of the felony defendant who has fled to another country. It has held, though, in a speedy trial case, that when "two separate sovereignties" were involved, the former "had a constitutional duty to make a diligent, good-faith effort" to obtain the defendant who was incarcerated in the latter in order to bring the defendant to trial promptly, even though it had no legal right to demand the return of the defendant. Smith v. Hooey, 393 U.S. 384, 393, 89 S.Ct. 575, 579, 21 L.Ed.2d 607 (1969).



But the two separate sovereignties in Smith were a state and the federal government. In a recent case construing the Sixth Amendment Confrontation Clause the Supreme Court recognized that the relationships, and as a result, the governmental responsibilities, are different within our federal system than in the international system. Mancusi v. Stubbs, 408 U.S. 204, 213, 92 S.Ct. 2308, 2313, 33 L.Ed.2d 293 (1972). The Court in Mancusi concluded that a state had not infringed on the defendant's right to confront witnesses against him when it failed to obtain a key witness who had testified at an earlier trial, but who resided in Sweden at the time the defendant was retried. The Mancusi holding may only be partially transferable to the speedy trial context, however, since different constitutional interests are at stake and the federal government may not always be as powerless to obtain the presence of persons residing abroad as the Court determined a state was in Mancusi. At any rate, the Second Circuit assumed as a matter of course in United States v. Estremera, 531 F.2d 1103 (2d Cir. 1976), that the Speedy Trial Rules due diligence provision required the government to seek

extradition or deportation of fugitives from foreign nations.

The Seventh Circuit faced the precise issue in United States v. McConahy, 505 F.2d 770 (1974), and held that there

is no reason not to apply the rule of Smith v. Hoey when the defendant is incarcerated by a foreign government rather than the United States or one of its states.

Id. at 773. Accordingly, the court dismissed the indictment for the government's failure to make a diligent good faith effort to procure the defendant from abroad. The fact that the extradition treaty in force between the two countries did not cover the offense did not relieve the government from making an effort to have the defendant extradited. Id.

Although the extradition treaty between Israel and the United States does not cover selective service offenses, the history of informal cooperation between the two countries in producing fugitives negates any presumption that Israel would have refused to cooperate in returning Salzman for trial if he were to refuse to return despite an offer of transportation. For example, before any extradition treaty existed between Israel and the United States, Israel deported Soblen, a convicted spy. See O'Higgins, Disguised



Extradition: The Soblen Case, 27 Modern L. Rev. 521 (1964); Evans, Reflections Upon the Political Offense in International Law, 57 Am. J. Int'l L. 1, 9-11 (1963); Thornberry, Dr. Soblen and the Alien Law of the United Kingdom, 12 Int'l & Comp. L. Q. 414 (1963); Tate, Draft Evasion and the Problem of Extradition, 32 Albany L. Rev. 337, 352-53 (1968). The case of Meier Lansky is equally well known. He was deported from Israel after a grand jury indicted him for failure to appear before it pursuant to subpoena. The reason Israel gave for the deportation was Lansky's "criminal past," although none of his convictions, all of which were for misdemeanors, were covered in the extradition treaty between the two nations. See United States v. Lansky, 496 F.2d 1063 (5th Cir. 1974). See also Klein, The Lansky Case, 8 Israel L. Rev. 286 (1963).

The preceding case law and authorities along with the government's failure to advise the court, pursuant to the court's order of May 19, 1976, of any policies or facts to the contrary, make it possible for the court to judicially notice the following facts (see Rule 201, Federal Rules of Evidence):

1. Neither the United States or the State of Israel characterizes violations of military conscription laws as political crimes.

2. The United States follows the policy and practice of endeavoring to procure the return to this country of some indicted defendants without resort to extradition treaties, but does not endeavor to procure the return to this country of defendants indicted for violation of the Selective Service laws or regulations.

3. Israel has produced persons pursuant to requests by the United States despite the fact that no extradition treaty mandated such cooperation.

4. There is a reasonable possibility that Israel would have cooperated in the return of Salzmänn had it been asked to do so.

In view of these findings, due diligence would require the government to request Israel's cooperation



regardless of the fact that the extradition treaty does not cover Salzmann's alleged offense.

There is some ground to suspect that the government's failure to pursue Selective Service delinquents with the same vigor as it pursues other fugitives may not be due to an evaluation of its chances for success, but rather may be due to policy. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 182-84, 83 S.Ct. 554, 575, 1 L.Ed.2d 644 (1963). A reason for the

government's dilatoriness in prosecution of alleged draft offenders was no doubt the unpopularity of the Vietnam war both here and abroad. Allowing draft evaders and military deserters to remain fugitives created a safety valve for the discontented. Aggressively seeking their return and prosecuting them vigorously would have provided a focal point for even stronger anti-American demonstrations abroad and established a series of martyrs for the anti-war movement at home. Allowing those who were unwilling to serve in the Armed Forces to reside unmolested in foreign countries was not only a humane policy, but also in the government's best interest. In fact, it may have been so

congruent with the national interest that the government may have had very little choice in the matter.

Whatever the government's reasons for seeking the return of war related fugitives less vigorously than other alleged felons, whether the reasons are valid or specious, the government cannot take further advantage of its policy of disparate enforcement by seeking to use the unavailability exception to the six months trial readiness requirement. The benign neglect of selective service fugitives is not only at odds with the due diligence requirement but also at odds with the Speedy Trial Clause of the Constitution generally, and its implementing plans. Justice Powell, writing on behalf of the majority in Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2191, 33 L.Ed.2d 101 (1972), strongly affirmed that the speedy trial principle "places the primary burden on the courts and the prosecutors to assure that cases are brought to trial."

One of the significant effects of the right to a speedy trial is the control it exerts on the government. The guarantee prevents oppressive conduct on the part of public officials by limiting their ability to intentionally



withhold a criminal trial. Rutherford v. State, 486 P.2d 946, 956 (Alaska 1971) (Connor & Rabinowitz J.J., dissenting in part). As Justice Brennan observed in his concurrence in Dickey v. Florida, 398 U.S. 30, 44, 90 S.Ct. 1564, 1571, 26 L.Ed.2d 26 (1970), "the guarantee protects our common interest that government prosecute, not persecute, those whom it accuses of crime."

When the government's failure to act expeditiously on Selective Service indictments means that those defendants must eventually go to trial without the speedy trial protections afforded other defendants, the question of selective prosecution arises. The due diligence requirement should be the same for all defendants regardless of the nature of the offense charged. Courts have not been receptive to selective prosecution claims in the past. But, attitudes are changing. Note, Reviewability of Prosecutorial Discretion: Failure to Prosecute, 75 Colum. L. Rev. 130 (1975).

Recent decisions have shown little tolerance for unequal treatment of defendants by those in charge of the criminal justice system. See, e.g., People of the State of New York v. Acme Markets, Inc., 37 N.Y.2d 326, 334

N.E. 2d 555, 372 N.Y.S.2d 590 (1975): Lennon v. INS, 527 F.2d 187 (2d Cir. 1975). In Lennon v. INS, John Lennon of Beatles fame contended that the Immigration and Naturalization Service strayed from its customary practices and abused its discretion by commencing deportation proceedings while he was seeking custody of his wife's child. The INS had not instituted deportation proceedings against aliens with criminal records far worse than Lennon's; he had been convicted in Britain for possession of marijuana. Lennon suggested that the deportation proceedings were instituted to prevent him from participating in demonstrations against the Vietnam war. Although the court characterized the selective prosecution claim as "premature," it stated that "courts will not condone selective deportation based upon secret political grounds." Id. at 195.

The discrepancy between the practice of the government with respect to seeking the return of persons accused of draft refusal and persons accused of other federal felonies, may not be sufficient to support an independent claim of selective prosecution. But it prevents the government from asserting that it has proceeded with the due diligence required by the speedy trial plans.



c. Analogy to Duty of Government to Obtain Presence of Person Incarcerated in Another Jurisdiction.

The conclusion that the government did not use "due diligence" in attempting to obtain Salzmann's presence is reinforced by comparing the government's efforts in the Salzmann case with the duties the Speedy Trial Rules impose on the government in an analogous situation, i.e., when the accused is imprisoned in another jurisdiction. All three Plans impose on the government the duty to attempt to obtain the presence of a prisoner incarcerated elsewhere promptly, or if that is impossible, to take steps to notify the prisoner of the charges so that an effective demand for a speedy trial can be made. This Rule is set forth in Rule 7 of the Second Circuit Rules, Rule 9(b) of the 50b Plan, and 10(b) of the Interim Speedy Trial Act Plan. Rule 7 of the Second Circuit Rules reads as follows:

7. If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state or other institution or that of another jurisdiction, it is his duty promptly:

(a) to undertake to obtain the presence of the prisoner for plea and trial; or

(b) when the government is unable to obtain the presence of the defendant, to cause a detainer to be filed with the official having custody of the prisoner and request him to advise the prisoner of the detainer and to inform the prisoner of his rights under these rules.

The latter two plans contain identical language, except for the requirement that the prisoner be informed of "his rights under the Federal Rules of Criminal Procedure" in addition to rights under the rules.

Analysis of Rule 7, and in particular subsection (a) of 7, is helpful when dealing with a Rule 5(d) [6(h) of Interim Speedy Trial Plan] problem because together they clarify the basic thrust of the Rules. Each rule places the responsibility for proceeding to trial speedily on the government. And this despite situations in which the accused could be blamed as primarily responsible for any delay, either through flight or additional criminality. The due diligence requirement of 5(d) [6(h)] ensures that it is not any fault of the defendant that extends the six months delay period, but rather the fact that the government cannot produce the defendant. The duties of the government with respect to defendants incarcerated in other jurisdictions



outlined in 7(a) emphasize the responsibility of the government to produce the defendant or to give the defendant the tools to make the production possible. Rule 7(a) and its subsequent counterparts forcefully destroy what was until recently the prevailing view that a defendant incarcerated elsewhere cannot demand a speedy trial since the defendant is responsible for the delay. See Note, The Right to a Speedy Criminal Trial, 57 Colum. L. Rev. 846, 850-51 (1957); A.B.A. Standards Relating to Speedy Trial Commentary to 3.1(a) (Approved Draft 1968).

But even before the Speedy Trial Plans, courts had begun to take the position that the state must use diligence to obtain an incarcerated defendant for trial. See, e.g., Coleman v. United States, 442 F.2d 150, 154 (D.C. Cir. 1971); Pellegrini v. Wolfe, 225 Ark. 459, 283 S.W.2d 162 (1955); People v. Piscitello, 7 N.Y.2d 387, 165 N.E.2d 849, 198 N.Y.S.2d 273 (1960). And in Smith v. Hooy, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1960), the Supreme Court ruled that the prosecuting jurisdiction must make a diligent effort to obtain custody of a defendant incarcerated in another jurisdiction if the

defendant demands a trial. Smith was a federal prisoner who had been indicted by a Texas grand jury. The Texas authorities made no attempt to obtain his custody in order to promptly try him, despite his demand for a trial.

Cases after Smith v. Hooey and the Speedy Trial Plans have stressed the principle that it is the government's responsibility to provide a speedy trial for defendants incarcerated elsewhere; at the same time they have rejected any notion that this responsibility depends on whether the defendant has demanded a speedy trial. See Barker v. Wingo, 407 U.S. 514, 533, 92 S.Ct. 2182, 2193, 33 L.Ed.2d 101 (1972); Coleman v. United States, 442 F.2d 150, 155 (D.C. Cir. 1971). See also Rule 8, Second Circuit Rules; Rule 7, E.D.N.Y. 50(b) Plan; Rule 8, Interim Speedy Trial Act Plan. As Professor David Rudstein has observed,

In determining whether the defendant's incarceration in another jurisdiction is a valid excuse for delay, the efforts of the prosecuting jurisdiction are determinative, not the defendant's demand for trial.

Rudstein, The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts, 1975 U. Ill. L. F. 11, 32.



d. Exceptional Circumstances and Excusable Neglect

Since the only specific provision that may toll the six month government readiness requirement, the unavailable defendant provision, does not apply because of the government's failure to act with due diligence to obtain Salzmann's presence, the only remaining way of tolling the running of the six month period is through general provisions. One such general provision is in the list of excluded periods that also contains the exclusion due to the absence or unavailability of the defendant. The generalized section refers to exceptional circumstances. It is Rule 5(h) of the Second Circuit Rules and the 50b Plan, and Rule 6(h) of the Interim Speedy Trial Act Plan. Rule 5(h) of the Second Circuit Rules reads as follows:

5. Excluded Periods.

In computing the time within which the government should be ready for trial . . . the following periods should be excluded: . . .

- (h) Other periods of delay occasioned by exceptional circumstances.

The subdivision (h) exclusion in the two subsequent Plans is identical in all important respects.

It is questionable whether the government can rely on 5(h) [6(h)] since they have not brought to the court's attention any exceptional circumstances that have made it impossible or even difficult to procure Salzmann's presence, other than his "fugitive" status. To qualify as "exceptional" within the purview of 5(h) [6(h)] the circumstances may "not be something with which the Plan's drafters were familiar." United States v. Rodriguez, --F.2d --, --, slip sheet 1434 (2d Cir. 1976). See also United States v. Favaloro, 493 F.2d 623 (2d Cir. 1974) (confusion in prosecutor's office not exceptional circumstances); United States v. Rolling, 487 F.2d 409, 413 (prosecutor's desire to finish another investigation not exceptional circumstances) and 475 F.2d 1108, 1110 (2d Cir. 1973).

Since 5(d) is specifically addressed to the fugitive problem it is apparent that the drafters had considered the issue. Nevertheless, even if the government were to suggest an exceptional circumstance not already covered by one of the enumerated exclusions, the court's inquiry is not closed. Instead, it must then proceed to



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balance the public's and the defendant's interest in prompt adjudication against any competing interest served by the exception. United States v. Rodriguez, -- F.2d --, -- (2d Cir. 1976); United States v. Rollins, 487 F.2d 409, 413-414 (2d Cir. 1973). A balancing process is also required by the other general exception to the six months rule.

The 50b Plan and the Interim Speedy Trial Act Plan contain a general exception in their Rules setting forth the government readiness requirement. This general provision permits the government to proceed to trial within ten days if the government's failure to be ready was excusable. Rule 4 of the 50b Plan and Rule 5 of the Interim Plan, which have been quoted in full, supra, begin by stating that the government must be ready for trial within six months after instituting criminal proceedings. If the government is not ready, the defendant may move for dismissal of the indictment. According to the Rules, the motion will be denied if one of the exceptions tolling the six month period applies. The Rules then continue:

Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

e. Exceptional Prejudice to Defendant

In considering whether the government should be permitted to have the delay of four years since indicting Salzman discounted because of either exceptional circumstances or excusable neglect, the severe prejudice to Salzman consequent to the delay must be weighed. Two significant alternatives that have been available to others accused of draft evasion are no longer available. The United States Attorney no longer has the power to exercise discretion and permit the defendant to submit to the draft in lieu of prosecution. And Salzman may no longer participate in the Amnesty Program.

The authority of the United States Attorney to offer submission to the draft as an alternative to prosecution terminated on July 1, 1973, with the expiration of the general induction authority provided for in 17(c) of the



Military Selective Service Act. 50 U.S.C. App. § 467.

Prior to July of 1973, which was over a year after Salzman had been indicted, and over three years from his alleged violation of the Selective Service Act, the government had made submission to induction a standard method of handling indicts. Henry Petersen, as Assistant Attorney General in charge of the Criminal Division, noted that it was the Justice

Department's policy to allow a defendant, in the absence of aggravating circumstances, to remove . . . delinquency under the Military Selective Service Act by submitting to the induction process and to authorize a dismissal of his indictment upon successful completion of induction.

Memorandum to United States Attorneys, Selective Service Cases (April 27, 1973).

This Justice Department policy was so widely applied that the Department credited submission to induction for the majority of dismissals of Selective Service indictments. During the period between March 1971 and February 1972, 1,565 Selective Service defendants were convicted, 293 were acquitted, and 2,021 had their indictments dismissed. 1,365 of the indictment dismissals were due to

submission to induction or performance of alternative civilian work, 36 to punitive classification, 23 because the board had no basis in fact for the classification, 285 because of irregularity in the proceedings classifying the defendant, and 312 for miscellaneous reasons. Hearings on Selective Service System Procedures and Administrative Possibilities for Amnesty Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess., at 396, (1972). These statistics indicate that 35.25% of the cases concluded involved indictments dismissed because of submission to induction.

The Eastern District of New York experience regarding submission to induction as an alternative to prosecution was similar to the national pattern. In an affidavit submitted in conjunction with United States v. Lockwood, 386 F. Supp. 734 (E.D.N.Y. 1975), an Eastern District selective service case, Assistant United States Attorney Maher indicated that

From 1966 to July 1973, the vast majority of [Eastern District]



Defendants who were indicted on charges emanating from a failure to report for induction and who expressed a desire to comply with the induction order were permitted to do so; and if they were accepted for induction (or if rejected by the Armed Forces), their indictments were dismissed on motion by the United States.

There is no indication in the record that Salzmann was ever notified that the Justice Department would consider seeking dismissal of his indictment if he submitted to induction. Furthermore, because of the extensive delay in bringing Mr. Salzmann to trial, the United States Attorney can no longer present this alternative to prosecution to him. As a result, Salzmann is deprived of a choice that so many other defendants made, and he is much more likely to be burdened with a criminal record. The prejudice from the delay is substantial, since Salzmann never expressed an unwillingness to serve in the military. There is a very real possibility that he would have taken advantage of this Justice Department policy and submitted to induction if his case had been pursued vigorously.

Due to the long delay in bringing Salzmann to trial there is a second alternative to prosecution that the United States Attorney can no longer offer. On September 16, 1974, President Ford signed a proclamation

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announcing a program for the return of Vietnam-era draft evaders and military deserters. As he signed the proclamation he noted that

The primary purpose of this program is the reconciliation of all our people and the restoration of the essential unity of Americans within which honest differences of opinion do not descend to angry discord, and mutual problems are not polarized by excessive passion.

My sincere hope is that this is a constructive step toward a calmer and cooler appreciation of our individual rights and responsibilities and our common purpose as a Nation, whose future is always more important than its past.

Hearings on Review of Agency Practices and Procedures in the Administration of the Presidential Clemency Program Before the Subcomm. on Administrative Practices and Procedures of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., at 9 (1974). The White House estimated that there were 15,500 draft evaders eligible for the program and 500,000 deserters. Of the over 15,000 draft evaders, about 4,060 were in situations similar to Salzmans, i.e., under indictment and listed as fugitives. White House Fact Sheet, Program for the Return of Vietnam Era Draft Evaders and Military



Deserters 1 (Sept. 16, 1974), id. at 12. The President's Program permitted a person under indictment to present himself to the United States Attorney before January 31, 1975, a date which was later extended to March 31, 1975, if he agreed to perform a period of alternate service ranging up to two years under the auspices of the Director of Selective Service in return for dismissal of the indictment with prejudice. The Amnesty Program ended approximately five years after Salzman failed to appear for his pre-induction physical and approximately three years after the government indicted him.

Detailed examination of the Speedy Trial Plans that have been in effect since Salzman's indictment indicates that the government has violated Salzman's rights under the Plans. The government failed to exercise due diligence to obtain his presence for trial. As a result, four years have passed and a prospective trial date is still not in sight. Any circumstances that the government may point to in order to excuse its neglect of this case are far outweighed by the prejudice already incurred by this defendant.

B. Constitutional Right to Speedy Trial

In United States v. Lockwood, 386 F. Supp. 734 (E.D.N.Y. 1975), this court rejected a blanket motion to dismiss the indictments pending against twenty-six defendants accused of violating the selective service law. Appointed counsel urged that their Sixth Amendment right to a Speedy Trial had been violated. The court granted the defendants leave to renew the motion individually, however, when facts were developed in each case that would permit the court to conduct the delicate balancing required by the Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The discovery conducted by defendant Salzman now makes it possible to consider the Sixth Amendment claim.

The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U. S. Const. Amend. VI. In construing this clause, the Supreme Court has emphasized its importance. Beavers v. Haubert, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed. 950 (1905); Pollard v. United



States, 352 U.S. 354, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957); United States v. Ewell, 383 U.S. 116, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966); Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); Smith v. Hooey, 393 U.S. 374, 89 S.Ct. 575, 21 L.Ed.2d 607 (1969); Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Not until the decision in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), however, did the Court articulate "the criteria by which the speedy trial right is to be judged." Id. at 516, 92 S.Ct. at 2185. In Barker, the Court adopted an ad hoc four part balancing test "in which the conduct of both the prosecution and the defendant are weighed." Id. at 530, 92 S.Ct. at 2192.

The four factors that must be assessed are: the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant. Id. at 530, 92 S.Ct. at 2192. The Supreme Court regarded none of these factors as decisive.

Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.

Id. at 533, 92 S.Ct. at 2193. See Moore v. Arizona, 414 U.S. 25, 26, 94 S.Ct. 188, 189, 38 L.Ed.2d 183 (1973).

1. Length of Delay

The length of the delay in the Salzmann case is substantial even though the Sixth Amendment only applies to post-accusation delay. Dillingham v. United States, -- U.S.--, 96 S.Ct. 303, 46 L.Ed.2d 225 (1975) (Per Curiam); United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971). Discussion of the more than two years that passed between the alleged crime and indictment and of the nearly seventeen months that passed between the prosecutor's receipt of the delinquent registrant report and the indictment will be reserved for the analysis of Rule 48(b) of the Federal Rules of Criminal Procedure, infra. Salzmann was indicted in June of 1972. Four years later he has still not been brought to trial. The length of this delay places a heavy burden of justification on



the government. See, e.g., United States v. Jones, 524 F.2d 834, 849 (D.C. Cir. 1975); United States v. Geelan, 520 F.2d 585, 587 (9th Cir. 1975); United States v. West, 504 F.2d 253, 255-56 (D.C. Cir. 1974).

## 2. Reasons for Delay

Salzmann and the government share responsibility for this delay. There is no indication in the record that Salzmann has made any serious effort to return to the United States for trial. On the other hand, it would be a distortion to classify him a fugitive who has sought to avoid trial. Salzmann emigrated to Israel in 1969. Since his rabbinical studies in the United States guaranteed him exemption from the draft, his assertion that he "did not run away from America but went to Israel" for positive reasons, must be accepted. During his residency in Israel, he has served in the Israeli Army and applied for Israeli citizenship. Although Salzmann has not traveled to this country to meet any military obligations or to make any court appearances, he has been conscientious in informing the government of his residence and explaining why he has not appeared in the States. Time and again he has told the government that he lacks funds to travel back to the

United States.

The Supreme Court has made clear in its Speedy Trial Clause cases that once a defendant is indicted, the government has a duty to act diligently to procure the accused for trial. As Justice Powell expressed it in Barker v. Wingo, 407 U.S. 514, 527, 92 S.Ct. 2182, 2190, 33 L.Ed.2d 101 (1972), "A defendant has no duty to bring himself to trial; the State has that duty. . . ."

This duty even survives the voluntary commission of criminal acts that place the defendant in the custody of another jurisdiction. See, e.g., Dickey v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); Prince v. Alabama, 507 F.2d 693, 706 (5th Cir.), cert. denied, -- U.S. --, 96 S.Ct. 147, 46 L.Ed. 2d 108 (1975); Hoskins v. Wainwright, 440 F.2d 69, 71 (5th Cir. 1971). aff'd after remand, 472 F.2d 158 (1972), rev'd on reh. 485 F.2d 1186 (1973). In those cases in which a speedy trial claim is denied because of the defendant's flight from prosecution, the courts have been careful to find that the government made diligent efforts to locate the defendant. United States v. Weber, 479 F.2d 331, 332-33 (8th Cir. 1973).



See also United States v. Parish, 468 F.2d 1129, 1134-35, 1137 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S.Ct. 1430, 35 L.Ed.2d 690 (1973). Cf. Hanrahan v. United States, 348 F.2d 363, 367 (D.C. Cir. 1965). But see United States v. Ramirez, 524 F.2d 283, 285 (10th Cir. 1975) ("inept efforts").

As was clear from the discussion of the Speedy Trial Rules requirement that the government exert due diligence to obtain the presence of unavailable defendants, supra, the government has, for many reasons, done less to procure fugitive draft evaders than other felons. But we need not reach the issue here of whether the government's failure to seek extradition has resulted in a trial delay so prejudicial to the defendant as to require dismissal. In Salzmann's case, the government's failure to respond to his claims that finances made it impossible for him to appear in court amounts to at least negligence. In light of this failure to even offer transportation to the United States to stand trial, it is hard to contend that the government has made a reasonable, good faith effort to procure Salzmann's presence. See Strunk v. United

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States, 412 U.S. 434, 436, 93 S.Ct. 2260, 2262, 37 L.Ed.2d 56 (1973); Barker v. Wingo, 407 U.S. 514, 531, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972); United States v. Geelan, 520 F.2d 585, 588 (9th Cir. 1975); United States v. McConahy, 505 F.2d 770, 773 (7th Cir. 1974). See also United States v. Roberts, 515 F.2d 642, 647 (2d Cir. 1975) (indictment dismissed for delay due to government inactivity); Hanrahan v. United States, 348 F.2d 363, 368 (D.C. Cir. 1965) (indictment to be dismissed if delay due to government negligence); United States v. Reed, 285 F. Supp. 738, 743 (D.D.C. 1968) (indictment dismissed due to delay caused by government negligence). Cf. United States v. Brown, 520 F.2d 1106, 1108, 1109, 1113 (D.C. Cir. 1975) (dismissed for what were largely institutional delays); United States v. West, 504 F.2d 253, 256 (D.C. Cir. 1974) (same); United States v. Fay, 505 F.2d 1037, 1039, 1040 (1st Cir. 1974) (same); United States v. Calloway, 505 F.2d 311, 319 (D.C. Cir. 1974) (same).

When interpreting related constitutional rights the Supreme Court has given conclusive weight to the government's failure to make a reasonable good-faith effort to obtain the presence of those residing abroad.



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For instance, the duty to obtain witnesses is imposed by a companion clause to the Sixth Amendment's Speedy Trial Clause, the Compulsory Process Clause. See Westen, Compulsory Process II, 74 Mich. L. Rev. 191, 276 (1975). The Sixth Amendment states that "In all criminal prosecutions, the accused shall enjoy the right. . .to have compulsory process for obtaining witnesses in his favor. . . ." U. S. Const. Amend. VI.

A central problem in the enforcement of this Clause is the effort the government must exert to produce witnesses for the defense. To prevent this Clause from becoming a "dead letter," in the words of John Marshall, United States v. Burr, 25 F.Cas. 30, 33 (C.C.D. Va. 1807) (Marshall, Cir. J.), courts have held that a defendant is entitled to demand that a state make a reasonable, good-faith effort not only to serve its subpoenas, see United States v. Bolden, 461 F.2d 998, 1000 (8th Cir. 1972); Maguire v. United States, 396 F.2d 327, 330 (9th Cir. 1968), cert. denied, 393 U.S. 1099, 89 S.Ct. 897, 216 L.Ed.2d 792 (1969), but also to ensure compliance with them if the defendant can show some likelihood that the effort will be successful. See, e.g., Johnson v. Johnson, 1

375 F. Supp. 872, 875-76 (E.D. Mich. 1974). This reasonable, good-faith effort standard has been construed to require the government to make intensive searches. People v. Beyea, 38 Cal. App. 3d 176, 191, 113 Cal. Rptr. 254, 263 (1974); State v. Pereda, 111 Ariz. 344, 529 P.2d 695, 697 (1974) (insufficient to rely on telephone calls without visiting witness' residence or place of business); Johnson v. Walker, 199 F. Supp. 86, 95 (E.D. La. 1961), aff'd, 317 F.2d 418 (5th Cir. 1963) (issuance of a statewide pickup order); Commonwealth v. Blair, --Pa. --, --, 331 A.2d 213, 214 (1975) (visits to her residence, her parents' residence plus all-night vigil outside her residence); Westen, Compulsory Process II, 74 Mich. L. Rev. 191, 276 ff. (1975). Similar efforts must be made to obtain witnesses from foreign jurisdictions. Cf. Poe v. Turner, 490 F.2d 329, 331-32 (10th Cir. 1974); Williams v. Maryland, 375 F. Supp. 745, 755-56 (D. Md. 1974) (state failed to pursue leads into neighboring jurisdiction); United States v. Singleton, 460 F.2d 1148, 1152-53 (2d Cir. 1972).



When the government relies on information from an informer who witnessed the defendant's actions "fundamental. . . fairness" requires the government to locate the informer so that the defendant can call the informer as a witness. Roviaro v. United States, 353 U.S. 53, 60, 77 S.Ct. 623, 628, 1 L.Ed.2d 639 (1957). The government's efforts to produce the informer must be reasonable and made in good faith. Velarde-Villarreal v. United States, 354 F.2d 9, 13 (9th Cir. 1965); United States v. Clarke, 220 F. Supp. 905, 908 (E.D. Pa. 1963); Eleazer v. Superior Ct., 1 Cal. 3d 847, 853, 464 P.2d 42, 46, 83 Cal. Rptr. 586, 590 (1970).

When unavailability of a witness is used as a basis for admission of hearsay, the government must make reasonable good-faith efforts to confront the defendant with the witnesses against the defendant. Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 1322, 20 L.Ed. 2d 255 (1968); United States v. Lynch, 499 F.2d 1011, 1023 (D.C. Cir. 1974).

Under the Speedy Trial analysis outlined in Barker, the government's failure to exert a reasonable

good-faith effort to obtain Salzmänn is not conclusive. Two more factors must also be weighed. They are the defendant's assertion of his right to a Speedy Trial and the prejudice to the defendant from the delay.

### 3. Assertion of Right

Professor Lusky moved to dismiss Salzmänn's indictment, along with those against other Selective Service defendants, on speedy trial grounds in the fall of 1974, and again in the fall of 1975, after Salzmänn had requested that Professor Lusky represent him. Salzmänn had not raised the speedy trial issue prior to Lusky's intervention on his behalf. Although the Supreme Court considers assertion of the right an important factor in determining whether the defendant has been deprived of the right, Barker v. Wingo, 407 U.S. 514, 531-32, 92 S. Ct. 2182, 2192-93, 33 L.Ed.2d 101 (1972), Salzmänn's long silence does not weigh heavily against him. He was without counsel prior to his request that Lusky represent him. It is likely, therefore, that he was unaware of his right to a speedy trial or of the consequences of his failure to demand a trial promptly. Failure to demand a



speedy trial cannot be construed as a waiver unless knowingly and voluntarily made. Id. at 529, 92 S.Ct. at 2191. See United States v. Holt, 448 F.2d 1108, 1111 (D.C. Cir.), cert. denied, 404 U.S. 942, 92 S.Ct. 292, 30 L.Ed.2d 256 (1971); United States v. Butler, 426 F.2d 1275, 1278 (1st Cir.), aff'd after remand, 434 F.2d 243 (1970), cert. denied, 401 U.S. 978, 91 S.Ct. 1207, 28 L.Ed. 2d 328 (1971); United States v. Reed, 285 F. Supp. 738, 741 (D.D.C. 1968). Cf. Rule 8, Second Circuit Rules; Rule 7, E.D.N.Y. 50(b) Plan; Rule 8, Interim Speedy Trial Act Plan. The government's position that "where [a] defendant was aware of the pending indictment, his decision to avoid trial constitutes a waiver of his right to a speedy trial" is simply incorrect. Letter of Assistant United States Attorney Thomas R. Maher, United States v. Salzmann, June 10, 1976.

#### 4. Prejudice to Defendant and Public

The final factor is the prejudice to the defendant. Salzmann and his family have endured for four

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years the anxiety attendant on criminal indictment, a burden that is weighty. See Strunk v. United States, 412 U.S. 434, 439, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56 (1973); United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971); Note, The Right to a Speedy Criminal Trial, 57 Colum. L. Rev. 846, 864 (1957).

In addition, Salzman has suffered a special prejudice. As was noted in some detail in the course of a discussion of the Speedy Trial Rules, supra, Salzman cannot take advantage of two options available to other draft offenders to escape prosecution. The United States Attorney is no longer able to offer submission to induction into the Armed Forces or participation in the Amnesty program. The severity of this prejudice is obvious.

We recognize that, in comparison with the number of Sixth Amendment claims made, relatively few claims are treated favorably. The paucity of cases in which courts have granted a defendant's Sixth Amendment claim is in large part due to the harsh nature of the relief. Since a court must dismiss an indictment with prejudice if it concludes that the balance of the Barker factors is



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in the defendant's favor, Strunk v. United States, 412 U.S. 434, 440, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56 (1973), courts have required a significantly stronger showing by defendants than was arguably envisioned by the Supreme Court. In a candid appraisal of the situation the court in United States v. Jones, 524 F.2d 834, 852 (D.C. Cir. 1975), noted that

Operating in a field where the only possible remedy is 'the draconian remedy of dismissal of the indictment,' we have been reluctant to find that an accused's right to a speedy trial has been violated absent a credible showing that he has been substantially prejudiced by the delay.

See also United States v. Gavic, 520 F.2d 1346, 1350 (8th Cir. 1975); United States v. Douglas, 504 F.2d 213, 219 n. 7 (D.C. Cir. 1974).

Professor Amsterdam has suggested that even the Supreme Court's opinions do not foreclose more flexibility in remedial response to Sixth Amendment claims. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 Stan. L. Rev. 525, 535, 537 (1975). Cf. Speedy Trial Act, 18 U.S.C.A. § 3162(a) (1975). Due to the extensive delay, the government inaction and the substantial irreversible



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prejudice, however, the only appropriate remedy in this case is dismissal with prejudice.

Justice White in *United States v. Ewell*, 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966), listed the three interests that the Sixth Amendment protects. It stands as a buffer between the defendant and extended incarceration, it helps insure a fair trial with fresh evidence and it reduces the anxiety and vulnerability a defendant experience while under indictment. The loss of the chance to escape the heavy burden of a felony conviction is the type of prejudice against which the Constitutional right to a speedy trial was designed to protect a defendant. In effect, the long delay, to which the government contributed in no small measure, has destroyed Salzman's ability to emerge as unscathed from his confrontation with the criminal process as other draft offenders. Such an impairment to the fairness of the criminal proceedings requires dismissal with prejudice. *Strunk v. United States*, 412 U.S. 434, 440, 93 S.Ct. 2260, 2263, 37 L.Ed.2d 56 (1973). Cf. *Dickey v. Florida*, 398 U.S. 30, 38, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970). Remedies that might be suitable cures for the infringement of the defendant's right to a speedy trial in other circumstances, such as dismissal without

prejudice, or expediting the trial, are ineffectual in righting the wrong suffered by Salzmänn.

In two significant Sixth Amendment cases the Supreme Court made clear that it is not necessary to find that the prejudice to a defendant was the result of purposeful government activity to dismiss with prejudice. Strunk v. United States, 412 U.S. 434, 436-7, 93 S.Ct. 2260, 2262, 37 L.Ed.2d 56 (1973); Barker v. Wingo, 407 U.S. 514, 531, 92 S.Ct. 2182, 2193, 33 L.Ed. 2d 101 (1972) (dictum). While the court was discussing the prejudice to defendants' ability to defend themselves in Barker, the prejudice to defendants' ability to escape prosecution altogether must certainly be as important. In both instances, what is protected is a citizen's right to interact with the criminal justice system in such a way that the citizen can avoid any criminal record and the punishment and disabilities that a judgment of guilt entails.

Reduction of criminal penalties was precisely the type of prejudice that influenced the court in Smith v. Hooey, 393 U.S. 374, 378, 39 S.Ct. 575, 21 L.Ed.2d 607 (1969), to dismiss the indictment on Sixth Amendment grounds. In Smith the government's failure to procure the defendant's presence for trial while he was incarcerated in another jurisdiction meant that he "forever lost" the opportunity



to have concurrent sentences and thus avoid additional incarceration on the second offense Id. See also Prince v. Alabama, 507 F.2d 693, 707 (5th Cir.), cert. denied, -- U.S. --, 96 S.Ct. 147, 46 L.Ed.2d 108 (1975); United States v. Geelan, 520 F.2d 585, 589 (9th Cir. 1975); United States v. Rucker, 464 F.2d 823, 826 (D.C. Cir. 1972); Coleman v. United States, 442 F.2d 150, 154 (D.C. Cir. 1971). But see United States v. Ramirez, 524 F.2d 283, 285 (10th Cir. 1975). Of course, government inaction or negligence operates to increase the presumption of prejudice. Murray v. Wainwright, 450 F.2d 465, 471 (5th Cir. 1971).

Permitting the delay in the Salzmann case injures not only the interests of the defendant but also the public interest. The Second Circuit has stated that the Plans for Achieving Prompt Disposition of Criminal Cases, insofar as they promote prompt adjudication of criminal cases, serve the public even more than defendants. United States v. Yagid, 528 F.2d 962 (2d Cir. 1976); United States v. Roemer, 514 F.2d 1377, 1381 (2d Cir. 1975); United States v. Flores, 501 F.2d 1356, 1360 n. 4 (2d Cir. 1974) (Per Curiam); United States v. Rollins, 487 F.2d 409 (2d Cir. 1973). As was pointed out in the review of the history of the Rules, from the very beginning the Rules' drafters viewed them as vehicles to serve both the public

and the defendant. The sensitivity to the service Speedy Trial Rules perform for the public is only natural since courts have long been aware that the constitutional right to a speedy trial is vital to the protection of the public. See, e.g., Barker v. Wingo, 407 U.S. 514, 519, 92 S.Ct. 2182, 2186, 33 L.Ed.2d 101 (1972).

Justice Brennan enumerated three ways in which the public is harmed by delayed trials: the impairment of the ability to convict, the danger of repeated criminality and the weakening of deterrence.

The Speedy Trial Clause protects societal interests, as well as the of the accused. The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case. Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction.

Dickey v. Florida, 398 U.S. 30, 42, 90 S.Ct. 1564, 1571, 26 L.Ed.2d 26 (1970) (concurring).



The first two points made by Justice Brennan may have less impact in draft cases. The heavy reliance in draft cases on documentary evidence in the possession of the government means that the capacity of the government to prove its case may not be as seriously hampered in the Salzman prosecution as in some other criminal prosecutions. United States v. Lavin, 480 F.2d 657 (2d Cir. 1973); United States v. Dyson, 469 F.2d 735, 740 (5th Cir. 1972); United States v. Golon, 378 F. Supp. 516, 520 (D. Mass. 1974), rev'd on other grounds, 511 F.2d 298 (1st Cir.), cert. denied, 421 U.S. 992, 95 S.Ct. 1999, 44 L.Ed. 2d 483 (1975); United States v. Dancals, 370 F. Supp. 1289, 1300 (W.D.N.Y. 1974). Similarly, due to the unique nature of the offense and the likelihood of flight, draft evaders are less likely to commit other crimes before they are tried than most other criminals. Many of those who avoided military service did so for political reasons rather than from any inclination toward criminality.

On the other hand, the deterrence value of prosecution is much more seriously impaired by delay in a draft case than in most criminal prosecutions. The inordinate delays in Selective Service cases, contrary to the express command of Section 462 of Title 50 of the United States Code Appendix may explain why there are

presently so few convictions and sentences are so light. In 1975, of a total 1,376 dispositions, 1,147 were not convicted; only 56 were convicted after trial and only 20 jail terms were imposed. 1976 Semi-Annual Report of the Director of the Administrative Office of the United States Court 38.

The end not only of the Vietnam conflict, but also of the draft has made any deterrent value from the prosecution of draft evaders highly speculative. It may be that the draft will be reinstituted, but the prospect of that in the near future is slight. The proper question from the standpoint of deterrence is whether the dismissal of indictments from the Vietnam period for failure to prosecute promptly will encourage evasion of any future draft laws. It seems likely that the prosecution policy of each conflict, whether it is prompt or dilatory, will have a more significant effect on deterrence than the indictment dismissal rate during previous wars. But, any deterrence value that does transfer to some possible future conflict will be enhanced by making it clear that the government must prosecute swiftly wherever possible.

As far as specific deterrence is concerned, prosecution at this time is unlikely to have any socially beneficial effect on Salzmann. Rather, all the socially



beneficial effects would have stemmed from government compliance with the speedy trial principle. If the government had responded promptly to Salzmänn's dilemma, prosecution might have been avoided altogether. Mr. Salzmänn indicated no aversion generally to fighting and did not settle abroad in order to escape draft obligations. If the government had proceeded expeditiously, Mr. Salzmänn might have chosen to submit to induction. If his presence had been obtained promptly, as the record indicates may have been possible with a minimum of government effort, then the anxiety suffered by Salzmänn and his family and the burden of this prosecution to the court and prosecutor might have been avoided altogether.

A final public interest should be mentioned. President Ford has spoken of the importance of the "reconciliation of all our people" and of the fact that our Nation's "future is always more important than its past." For the government to continue to press the prosecution of Salzmänn now, long after the war, when it failed to respond at all, much less intelligently, to his correspondence at a time when response might have benefited the country by obtaining another member for the Armed Forces and might have avoided the severe prejudice now suffered by Salzmänn is highly inequitable and thoroughly at odds with the speedy trial principle.

### C. Federal Rules of Criminal Procedure 48(b).

Authority exists in addition to the Speedy Trial Rules and the Sixth Amendment to justify dismissal of the present indictment for unwarranted delay by the government in its prosecution of defendant Salzmann. The inherent residual power derived from common law of a court to control its own dockets enables courts to dismiss cases for failure to prosecute. United States v. Furey, 514 F.2d 1098, 1103 (2d Cir. 1975); Mann v. United States, 304 F.2d 394, 398 (D.C. Cir.), cert. denied, 371 U.S. 896, 83 S.Ct. 194, 9 L.Ed.2d 127 (1962); Ex Parte Altman, 34 F. Supp. 106, 108 (S.D. Cal. 1940). This power was specifically restated in Rule 48(b) of the Federal Rules of Criminal Procedure and provides the court with authority independent of Sixth Amendment and Speedy Trial Rules considerations. See Advisory Committee Notes to Rule 48, 8A Moore's Federal Practice ¶ 48.01. Rule 48(b) states:

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

#### 1. When 48(b) applies

There are three periods of delay that may be relevant to Rule 48(b). The first is the one and one-third



years between the local board's filing of a delinquent status report with the United States Attorney and the indictment. Salzmänn was ordered to report for pre-induction processing on May 27, 1970, and for induction on January 18, 1971; he obeyed neither order. On February 3, 1971, the local board notified the United States Attorney's office of his delinquent status. In June of 1972, the government indicted defendant for his failure to report.

The second period is the two and one-quarter years between indictment and the first motions made on Salzmänn's behalf. Twelve days after the indictment was filed on June 26, 1972, a bench warrant was issued. Thereafter the case lay dormant for over two years until this court, in September of 1974, in an attempt to expedite the many outstanding selective service cases on its docket, appointed Professor Lusky attorney for Salzmänn and twenty-six other defendants.

The final period, lasting approximately two years, is the time during which this case has been actively before this court and on appeal. From September 1974 to the present, this court has heard motions, including the present motion to dismiss.

Arrest is a public act that may seriously interfere with the defendant's liberty, whether he

is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. . . . So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

404 U.S. at 320, 92 S.Ct. at 463.

Despite the fact that the Marion interpretation of 48(b) is dicta, recent cases have supported its reading of the time at which 48(b) attaches. See, e.g., United States v. Giacalone, 477 F.2d 1273, 1275 (6th Cir. 1973) (pre-indictment delay only considered in the context of the defendant's Fifth Amendment due process rights); United States v. Iannelli, 461 F.2d 483, 485 (2d Cir. 1972), cert. denied, 409 U.S. 980, 93 S.Ct. 310, 34 L.Ed.2d 243 (1972) (same); United States v. White, 470 F.2d 170, 174 (7th Cir. 1972) (same).



Under this interpretation, then, Salzman's rights under 48(b) attached, at the latest, at the second of the three above mentioned stages; he can point to a delay of at least 2-1/4 years from his indictment to this court's order of September 1974. There exists ample authority, however, which would enable defendant Salzman to complain not only of the second, but also the first of the three periods of delay, the 1-1/3 years from the time of the local board's referral of the case for prosecution to the filing of an indictment. Entirely consistent with the Marion decision, this authority depends on the special nature of selective service cases in order to apply a more stringent standard of expeditionness to the government.

All prosecutions of selective service cases are subject to a special statute mandating expeditious prosecution. The Selective Service Act of 1967 provides:

The Department of Justice shall proceed as expeditiously as possible with a prosecution under this section, or with an appeal, upon the request of the Director of the Selective Service System or shall advise the House of Representatives and the Senate in writing the reasons for its failure to do so.

50 U.S.C. App. § 462(c). Of relevance to the instant case is the legislative history of this section which indicates that:

[the] committee believes that enactment of this provision will create a sense of urgency in the Department of Justice in respect to violations of the Selective Service Act.

1967 U.S. Code Cong. & Admin. News 1967, p. 1333. Moreover, 50 U.S.C. App. 462(a) adds the requirement that

[precedence] shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing.

Courts faced with prosecutions under this title have responded to these statutory requirements by measuring the time of delay not from the point of indictment, but from the time that the United States Attorney was notified of the potential violation. See United States v. Dyson, 469 F.2d 735, 741 (5th Cir. 1972); United States v. Daneals, 370 F. Supp. 1289, 1299-1300 (W.D.N.Y. 1974).

In deciding, therefore, whether to dismiss defendant's indictment under Rule 48(b), this court is not limited to delay from indictment to the present. The Congressional mandate for speedy prosecution under the Selective Service Act of 1967 justifies examination of the delay between the February 1971 referral to the government and the filing of an indictment.



### B. Unnecessary Delay

The 48(b) right is not only broader than the Sixth Amendment right in that it may attach before a person is accused but also in that once brought to bear Rule 48(b) provides significantly stricter standards by which this court must judge the government's efforts to bring defendant Salzman to trial.

That 48(b) requires dismissal when there has been a violation of a defendant's right to a speedy trial has long been clear. Pollard v. United States, 352 U.S. 354, 361 n. 7, 77 S.Ct. 481, 486, 1 L.Ed.2d 393 (1957); United States v. Ward, 240 F. Supp. 659, 660 (W.D. Wis. 1965); United States v. Palermo, 27 F.R.D. 393, 394 (S.D.N.Y. 1961). Yet Rule 48(b) does more than implement constitutional guarantees:

it is designed also to protect other compelling public interests -- not necessarily of constitutional proportions -- in the prosecution of those accused of crime without the procrastination of which the processes of law are sometimes guilty.

United States v. Mark II Electronics, 283 F. Supp. 280, 283 (E.D. La. 1968) and 305 F. Supp. 1280, 1287 (1969). See also United States v. Clay, 481 F.2d 133, 135 (7th Cir.), cert. denied, 414 U.S. 1009, 94 S.Ct. 371, 38 L.Ed. 2d 247

(1973); United States v. DeLeo, 422 F.2d 487, 495 (1st Cir.), cert. denied, 397 U.S. 1037, 90 S.Ct. 1355, 25 L.Ed.2d 648 (1970); United States v. Cartano, 420 F.2d 362, 363 (1st Cir.), cert. denied, 397 U.S. 1054, 90 S.Ct. 1398, 25 L.Ed.2d 671 (1970); Mathies v. United States, 374 F.2d 312, 314-15 (D.C. Cir. 1967) (Rule 48(b) "places a stricter requirement of speed on the prosecution, and permits dismissal of an indictment even though there has been no constitutional violation"); Mann v. United States, 304 F.2d 394, 398 (D.C. Cir.), cert. denied, 371 U.S. 896, 83 S.Ct. 194, 9 L.Ed.2d 127 (1962).

Finally, when the Second Circuit faced the question of the relationship between Rule 48(b) and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, it recognized an important interaction between the two. In Hilbert v. Dooling, 476 F.2d 355, 360-61 (2d Cir.) (en banc), cert. denied, 414 U.S. 278, 94 S.Ct. 56, 38 L.Ed.2d 123 (1973), it analyzed the way Second Circuit Rule 4 and F.R.Cr.P. 48(b) dealt with the same general subject matter, finding no inconsistency between the two. The Court of Appeals declared:

Our Speedy Trial Rules merely flesh out the skeleton of Rule 48, giving content to the sweeping phrase "unnecessary delay" by substituting a more precise, albeit still flexible, six-month rule.



Because Rule 48(b) empowers this court to dismiss an indictment under a standard even more exacting than the Sixth Amendment requirement of prosecutorial speed, and because it incorporates the Second Circuit Rules within its definition of "unnecessary delay," this court is obliged to re-examine all of the factors mentioned previously in the discussion of the Rules and the Speedy Trial Clause. It must weigh Salzmann's notification to the government of his financial plight, the government's failure to respond despite the existence of readily available travel assistance, the long delay since indictment, and the prejudice from the end of induction and the amnesty program.

The delay in trying Salzmann promptly prejudiced him in yet another way. If he had been tried anytime within the two and a half years following his alleged violation of the law, or within the nearly two years following the notification of the United States Attorney of the violation, or within six months after the indictment, he would have been eligible for the special sentencing provisions for those under age twenty-six.

Section 4209 of title 18 of the United States Code permits a court to sentence a defendant under the age of twenty-six under the Federal Youth Corrections Act. As a result, Salzmann may have obtained a certificate setting

aside the conviction and erasing any record of it. 18 U.S.C. § 5021. See United States v. Roberts, 515 F.2d 642, 644 (2d Cir. 1975); United States v. Daneals, 370 F. Supp. 1289, 1300 (W.D.N.Y. 1974). On December 10, 1972, Salzmann's twenty-sixth birthday, these special advantages were lost to him forever. Even if these factors do not assume constitutional proportions, they buttress a finding of "unnecessary delay" within the meaning of Rule 48(b).

A Rule 48(b) dismissal is particularly warranted when the "unnecessary delay" language is read in the light of the Selective Service Act's mandate of expeditious prosecution. The court reasoned in United States v. Dyson, 469 F.2d 735, 738 (5th Cir. 1972), that 50 U.S.C. App. § 462 "requires defendants. . . to be brought to trial at a pace faster than speedy," thus placing a heavy burden of justification on the government. In Dyson there was an eight month pre-indictment and two year post-indictment delay. See also, e.g., United States v. Daneals, 370 F. Supp. 1289, 1300 (W.D.N.Y. 1974) (20-month pre-indictment delay); United States v. Rutkowski, 337 F. Supp. 340 (E.D. Pa. 1971) (five year pre-indictment delay).

The government has failed to sustain its burden with respect to defendant Salzmann for many of the same reasons previously mentioned in the discussion of the Rules



and Speedy Trial right. In addition, Selective Service cases are generally simple and unsophisticated, United States v. Dyson, 469 F.2d 735, 740 (5th Cir. 1972); United States v. Daneals, 370 F. Supp. 1289, 1300 (W.D.N.Y. 1974); United States v. Rutkowski, 337 F. Supp. 340, 342 (E.D. Pa. 1971), thus increasing the need for a close analysis of the reasons for delay.

It is settled that a Rule 48(b) dismissal is within the sound discretion of the trial judge. United States v. De Leo, 422 F. 2d 487, 495 (1st Cir.), cert. denied, 397 U.S. 1037, 90 S.Ct. 1355, -- L.Ed.2d -- (1970); United States v. Research Foundation, Inc., 155 F. Supp. 650, 654 (S.D.N.Y. 1957). For the reasons delineated above, this court is not satisfied that the government has sustained its burden of promptness in prosecuting this defendant. As grounds for dismissal in addition to the constitutional violations discussed above, the court exercises its discretion and dismisses this case under Rule 48(b) of the Federal Rules of Criminal Procedure.

D. 50 U.S.C. App. § 462

Authority exists that section 462 of title 50 of the United States Code Appendix is an independent ground for dismissal. These cases are referred to in the discussion of the constitutional right to a speedy trial

and of Rule 48(b), supra. Since section 462(c) affirmatively commands prosecution "as expeditiously as possible," it constitutes a standard stricter than the Rule 48(b) "unnecessary delay" requirement. See, e.g., United States v. Dyson, 469 F.2d 735 (5th Cir. 1972). Dismissal under section 462 is required.

#### CONCLUSION

Defendant, a permanent resident of a foreign state, did not return to the United States when ordered to do so for a pre-induction physical or for induction. The government indicted him for a violation of the Selective Service laws. It made no attempt to procure his presence for trial or even to furnish him with transportation back to this country.

Based on the government's failure to make a reasonable effort to bring him to trial, defendant has moved to dismiss the indictment. Speedy Trial Rules in effect during the period of indictment, specifically the 1971 Second Circuit Rules and Rules adopted pursuant to the Federal Rules of Criminal Procedure, Rule 50(b), and the Speedy Trial Act of 1974, all require dismissal for the government's failure to exert "due diligence." In addition, the government's neglect of the case violates



the Speedy Trial Clause of the Sixth Amendment, Federal Rules of Criminal Procedure, Rule 48(b), and section 462 of title 50 of the United States Code Appendix.

The severe prejudice suffered by the defendant is irreversible. The court has no alternative but dismissal. The action is dismissed with prejudice.

So ordered.

Dated: Brooklyn, New York  
July 16, 1976

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U.S.D.J.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- x  
UNITED STATES OF AMERICA,

- against -

72 CR 740

SIDNEY E. SALZMANN,

MEMORANDUM  
AND  
ORDER

Defendant.  
----- -x

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WEINSTEIN, D. J.

In United States v. Jack B. Weinstein, No. 74-2595  
(2d Cir., Jan. 30, 1975), the Court of Appeals, while review-  
ing an order regarding discovery of the Selective Service  
files of twenty-three delinquent registrants, noted that this



court was concerned "to determine whether the Government was making reasonable efforts to apprehend the fugitives, whether the public or the defendants were being prejudiced by the delay, and whether the indictments should not be dismissed." Slip sheet opinion at 1532. The Court of Appeals recognized that the government had submitted affidavits with respect to its "good faith efforts to locate and arrest" the defendants, including this defendant now before us. Slip sheet opinion at 1534. In concluding its opinion, the Court of Appeals made "clear that [it did] not intend to preclude Judge Weinstein from entertaining motions on behalf of fugitive defendants who have agreed that Professor Lusky . . . represent them." Slip sheet opinion at 1541.

Defendant Salzman submitted documentary evidence showing that he wished Professor Lusky to represent him. A hearing in the Salzman case was held before this court and evidence, including the full selective service file, was introduced. Briefs were filed. It was assumed that briefs and affidavits filed in related cases would be considered with defendant's motion to dismiss. Defendant pressed the arguments that the government's failure to inform Salzman of the reduced cost of travel to physical examination and induction

centers and of its policy to drop prosecutions of those who submit to induction invalidated the indictment. He also reiterated his reliance on the arguments made in this and higher courts that the government, in violation of the Speedy Trial Clause of the Sixth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment, had deliberately failed to procure attendance of defendant for trial despite knowledge of his whereabouts and the availability of extradition and other procedures to obtain his attendance in this court. The court requested further briefs on the issues of whether the absence of a savings clause in the legislation permitting the draft to expire and whether the unavailability of administrative discretion to permit a defendant to seek Presidential clemency after the end of the Amnesty Program on March 31, 1975, or to be inducted after the end of induction on July 1, 1973, constituted a denial of statutory and Constitutional rights. Briefs have now been submitted on these issues.

All of the issues adverted to may be closely related to those arising under the Plan for Achieving Prompt Disposition of Criminal Cases of this District which was in effect during much of the period when the indictment was



outstanding. Among the provisions which may be applicable in this case are the following:

"4. All Cases: Trial Readiness and Effect of Non-Compliance.

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

5. Excluded Periods.

In computing the time within which the government should be ready for trial . . . , the following periods should be excluded:

. . . .

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence. . . .

(h) Other period of delay occasioned by exceptional circumstances. . . .

. . . .

#### 7. Demand and Waiver Provisions.

A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. . . ."

A number of questions arise. For instance, can the government claim that it is ready for trial if, as the docket sheet indicates, the government has not filed a notice of readiness as required by United States v. Pierro, 478 F.2d 386, 388-89 (2d Cir. 1973), or, if it has not taken appropriate steps to procure the attendance of the defendant. Rule 9(b) covers an analogous situation. It reads in part as follows:

"(b) If the United States Attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a federal, state, or other institution or that of another jurisdiction, it is his duty promptly:



(i) to undertake to obtain the presence of the prisoner for plea and trial. . . ."  
(Emphasis supplied).

While the Rule speaks only of being in an institution, the burden of obtaining the presence of the defendant appears to rest on the government. The situation with respect to a "fugitive" may be different, of course, since unlike someone incarcerated he may be able to voluntarily return. In this connection the parties may wish to consider United States v. Samuel Knight, No. 75-1316 (2d Cir., Dec. 19, 1975), in which the court speaks of an "address . . . in Canada" (Slip sheet opinion at 1143) implying that if the address were known the government had an obligation under subdivision (d) of Rule 5 of the Vermont District Court Plan for Achieving Prompt Disposition of Criminal Cases to obtain "his presence for trial . . . by due diligence." Slip sheet opinion at 1142. In the case of the defendant before us, there are some facts with respect to his financial ability to return and the failure of the government to inform him of available travel assistance which may have a bearing on the issue of due diligence in Eastern District Rule 5(d).

Finally, if Rule 5(h), which excludes from the time to be ready a "period of delay occasioned by exceptional circumstances," is deemed relevant, it may also be important

to consider the prejudice to the defendant resulting from the end of the Amnesty Program and the United States Attorney's lack of power to exercise discretion permitting a defendant to comply with a Selective Service order in lieu of prosecution.

It might also be considered whether a constitutional right to a speedy trial has been violated apart from the provisions of the Plan for Achieving Prompt Disposition of Criminal Cases.

The court would appreciate, if the parties believe the issue is relevant, further communication regarding the applicability of the Plan for Achieving Prompt Disposition of Criminal Cases or the subsequently adopted Plan of the Eastern District of New York Under the Speedy Trial Act of 1974. The parties should notify the court within ten days of any intention to submit a brief and give an estimate of how much time they will require.

So ORDERED.

U. S. D. J.

Dated: Brooklyn, New York  
January 6, 1976

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

114

UNITED STATES OF AMERICA

INDICTMENT

-against-

SIDNEY E. SALZMANN,

Defendant.

Cr. No. 72 CR 740  
(T.50 U.S.C. App., §462(a);  
32 CFR 1632.14, 1628.16)

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 18th day of January 1971, and up to and including the date of the filing of this indictment, within the Eastern District of New York, SIDNEY E. SALZMANN, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act, as amended, Title 50, United States Code, Appendix, Section 451 et seq., and the Rules, Regulations and Directions made pursuant thereto, in that he being a registrant to whom an order to report for induction had been mailed by his Local Board No. 61, of the Selective Service System, did unlawfully and knowingly fail, neglect and refuse to comply with said induction order and such failure continues to this day. (Title 50 U.S.C. App., §462(a); 32 CFR 1632.14).

COUNT TWO

On or about the 3rd day of March 1970, and up to and including the date of the filing of this indictment, within the Eastern District of New York, SIDNEY E. SALZMANN, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act, as amended (Title 50 U.S.C., App., 451 et seq) and the Rules, Regulations and Directions made pursuant thereto, in that he being a registrant to whom an order to report

for an Armed Forces Physical Examination had been mailed by his Local Board No. 61, did unlawfully and knowingly fail, neglect and refuse to report for his Armed Forces Physical Examination. (Title 50 U.S.C. App., §462(a); 32 CFR 1628.16.)

A TRUE BILL.

---

Foreman

---

United States Attorney



EJB:TRM:ed  
F#711695United States District Court  
FOR THE~~EASTERN DISTRICT OF NEW YORK~~

UNITED STATES OF AMERICA

v.

No. 72 CR 740

SIDNEY E. SALZMANN

To<sup>1</sup> UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF NEW YORK,  
AND/OR ANY OF HIS DEPUTIES, AND/OR ANY UNITED STATES MARSHAL;  
AND/OR ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION

You are hereby commanded to arrest SIDNEY E. SALZMANN and bring him

forthwith before the United States District Court for the Eastern District of New York

in the city of Brooklyn, New York to answer to an 2ct. indictment charging him with willful failure to:

1. Comply with an induction order issued by his local board No. 61, requiring him to report for induction on or about the 18th day of January, 1971, and continuing thereafter to the date of the indictment upon his failure to comply on said date, in violation of Title 50 U.S.C. App., §462(a).
2. Comply with an order issued by his local board requiring him to report for a pre-induction physical examination on March 3, 1970 in violation of Title 50 U.S.C. App., §462(a) 32 CFR 1628.16.

Dated at ~~Brooklyn, New York~~  
on August 30, 1972

Lewis Orgel

Clerk.

Bail fixed at \$

By *[Signature]*  
Deputy Clerk.

## RETURN

District of

ss

Received the within warrant the

day of

19

and executed same.

By

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

v.

SIDNEY E. SALZMAN,

Defendant

Cr. No. 72 CR 740

AFFIDAVIT

I, Murray R. Stein, being first duly sworn, depose and say that: .

(1) I am an attorney employed by the United States Department of Justice. I have been assigned to the Criminal Division since my employment with the Department in 1964.

(2) As a part of my official duties, I am responsible for handling and supervising for the Department of Justice requests to be made by the Department of State to foreign governments for the extradition of fugitives from our justice. Additionally, I handle and supervise requests forwarded by the Department of State from foreign governments in which the Department of Justice provides representation for foreign governments before our courts. My experience includes extradition matters involving the Government of Israel. In the period I have worked in this field, I have been involved in excess of two hundred (200) extradition matters.



- 2 -

(3) I am familiar with the Extradition Convention between the United States of America and Israel, 14 UST 1707, which entered into force on December 5, 1963. I am familiar with the Israeli Extradition Law.

(4) The Extradition Convention with Israel authorizes the mutual surrender of citizens of the refuge country (Article IV). Further, it has been the practice of Israel to authorize the surrender of its citizens to the United States.

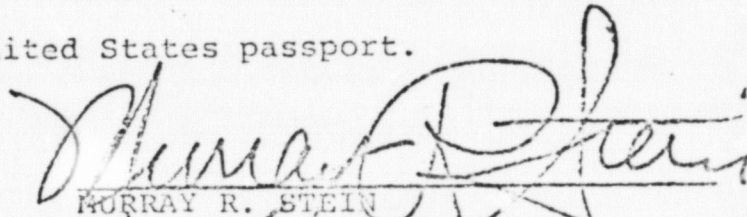
(5) It has been the practice of this Government to request the extradition from Israel of all fugitives who have been charged or convicted in this country for enumerated treaty offenses. The custody of fugitives, who sought refuge in Israel, has been obtained through our extradition agreement.

(6) Article II of the Extradition Convention with Israel does not enumerate violations of 50 U.S.C. App. 426, e.g., selective service offenses, as extraditable crimes. Article 21 of the Israeli Extradition Act prohibits surrender for offenses other than those specified by a treaty which requires enumeration. The Extradition Convention Between the United States and Israel requires such enumeration.

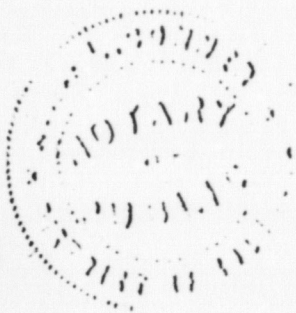
(7) The policy of this Government is not to make requests for the extradition of fugitives for whom we already know that surrender is impossible to obtain because the offense for which they were indicted is obviously not an enumerated treaty offense. Thus, no request has been made upon the Israeli Government for the extradition of fugitives who have been indicted for violation of our selective service statutes.

(8) Specifically in the matter involving the defendant in this case, it is my expert opinion that it would have been fruitless to request the defendant's extradition. Further, to make such a request would cause an embarrassment to this Government because it would have realized prior to presentation of a requisition for surrender that the Israeli Government was required by law to reject it.

(9) According to the records of the Department of Justice no action was taken to revoke the defendant's passport. I was personally advised by the Legal Division, Passport Office, Department of State that according to its records the fugitive does not possess a valid United States passport.

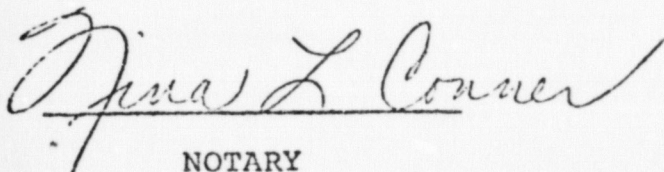


MURRAY R. STEIN  
Attorney  
Government Regulations and  
Labor Section  
Criminal Division  
Department of Justice



Sworn and subscribed to this

2 day of June, 1976.

  
NOTARY

My commission expires:

6/30/79



IN UNITED STATES  
IN THE CASE OF

( ) MAGISTRATE (X) DISTRICT ( ) APPEALS COURT or ( ) OTHER PANEL (Specify below)

120 (ON NUMBER)

United States vs. Sidney E.

FOR

Eastern District of New York

Salzmann

AT

Brooklyn, New York

PERSON REPRESENTED (Show your full name)

Sidney E. Salzmann

CHARGE/OFFENSE (describe if applicable & check box + ) ☒ Felony ☐ Misdemeanor

Violation of Selective Service Law and regulations thereunder

- 1 ☒ Defendant - Adult  
2 ☐ Defendant - Juvenile  
3 ☐ Appellant  
4 ☐ Probation Violator  
5 ☐ Parole Violator  
6 ☐ Habeas Petitioner  
7 ☐ 2255 Petitioner  
8 ☐ Material Witness  
9 ☐ Other (Specify)

DOCKET NUMBERS

Magistrate

District Court

72-CR-740

Court of Appeals

ANSWERS TO QUESTIONS REGARDING ABILITY TO PAY

ASSETS	EMPLOYMENT	Are you now employed? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Am Self Employed								
		Name and address of employer: <u>Schenberger-Kelly Architects H.L. P.O. 5287</u>								
		IF YES, how much do you earn per month? \$ <u>266.-</u>	IF NO, give month and year of last employment							
		How much did you earn per month \$								
		If married is your Spouse employed? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No								
		IF YES, how much does your Spouse earn per month \$ <u>133.-</u>	If a minor under age 21, what is your Parents or Guardian's approximate monthly income \$							
OTHER INCOME	Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, retirement or annuity payments, or other sources? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No									
	IF YES, GIVE THE AMOUNT RECEIVED & IDENTIFY THE SOURCES									
CASH	Have you any cash on hand or money in savings or checking account <input type="checkbox"/> Yes <input type="checkbox"/> No IF YES, state total amount \$ <u>83.-</u>									
PROPERTY	Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No									
	IF YES, GIVE VALUE AND DESCRIBE IT									
	<table border="1"><thead><tr><th>VALUE</th><th>DESCRIPTION</th></tr></thead><tbody><tr><td>\$ <u>33,000.-</u></td><td><u>apartment</u></td></tr><tr><td><u>2,000.-</u></td><td><u>car - SUBARU 1100, 1970</u></td></tr><tr><td><u>936.-</u></td><td><u>affiliated fund (mutual fund)</u></td></tr></tbody></table>			VALUE	DESCRIPTION	\$ <u>33,000.-</u>	<u>apartment</u>	<u>2,000.-</u>	<u>car - SUBARU 1100, 1970</u>	<u>936.-</u>
VALUE	DESCRIPTION									
\$ <u>33,000.-</u>	<u>apartment</u>									
<u>2,000.-</u>	<u>car - SUBARU 1100, 1970</u>									
<u>936.-</u>	<u>affiliated fund (mutual fund)</u>									

OBLIGATIONS & DEBTS	DEPENDENTS	MARITAL STATUS <input type="checkbox"/> SINGLE <input checked="" type="checkbox"/> MARRIED <input type="checkbox"/> WIDOWED <input type="checkbox"/> SEPARATED OR DIVORCED	Total No. of Dependents <u>3</u>	List persons you actually support and your relationship to them <u>Eva Salzmann wife</u> <u>David David Salzmann son</u> <u>Miriam Salzmann daughter</u>	
	DEBTS & MONTHLY BILLS	APARTMENT OR HOME: <u>Bank Tefshot</u> <u>Bank EOOD</u>	Creditors	Total Debt <u>\$ 8,330.-</u> <u>\$ 167.-</u> <u>\$</u> <u>\$</u>	Monthly Payt. <u>\$ 56.60</u> <u>\$ 5.00</u> <u>\$</u> <u>\$</u>
	LIST ALL CREDITORS, INCLUDING BANKS, LOAN COMPANIES, CHANGE ACCOUNTS, ETC.)				

I certify the above to be correct.

SIGNATURE OF DEFENDANT  
(OR PERSON REPRESENTED)

Sidney E. Salzmann

WARNING: A FALSE OR DISHONEST ANSWER TO A QUESTION IN THIS AFFIDAVIT MAY BE PUNISHABLE BY FINE OR IMPRISONMENT, OR BOTH

Sidney Salzman  
P.O.B. 5287  
Jerusalem, Israel  
September 25, 1972

A.U.S.A. Thomas R. Maher  
United States Department of Justice  
United States Attorney for the  
Eastern District of New York  
Federal Building  
Brooklyn, N.Y. 11201

Re: INDICTMENT  
CRIMINAL NO. 72 CR 740  
FOLDER NO. 711695  
MAILED: Aug. 10, 1972 (air mail)

Dear Mr. Maher,

On August 17, 1972, I received the above indictment for an alleged violation of the United States Criminal Code (Selective Service Act). My case was scheduled to be called in the U.S. District Court for the Eastern District of N.Y. in Westbury, Long Island. Since the indictment came one day before I was scheduled to appear and since, as you aware, my residence is in Israel, you will agree that it was quite impossible for me to appear at the scheduled time. In addition to this I should mention that I am not financially equipped at the present moment to undertake a voyage of this nature.

Furthermore, I would like to bring to your attention a few facts which I hope will shed some light on my case:

(a) I left the United States legally, I did not run away, and I had a valid deferment from the Army. I notified my Local Board (No. 61) of my new address and of my changes of address and status as they occurred. I am not in



hiding and the Local Board as well as the court, know my present whereabouts.

(b) My purpose in leaving the country was not evading military service. As I mentioned, I had a deferment and has no reason to believe that this deferment would not remain valid for as long as I wished it to. I had been planning to move to Israel for many years. This was the aim of all my studies and training, it was my goal and purpose in life and moving to Israel was the culmination of many years of Zionist training and upbringing. I therefore consider it an insult to treat my case as if it were of one who ran away at the last moment to a neighboring country or one who deserted the Army. On the contrary, I did not run away from America but went to Israel for positive reasons.

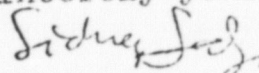
(c) I believe that I have the basic right to live in the country of my choice and especially in Israel, which is the historic homeland of my people. On the other hand, having been born in the United States, I feel U.S. citizenship to be my privilege and in no way wish to reject it.

(d) By the end of October, 1972, I will have been in Israel for a period of three years. This, by Israeli law, makes me a permanent resident of the country and eligible for the draft. When called I will serve and it is my sincere hope that upon serving in the Israel Defence Forces my status will change as regards my eligibility for, and responsibility to the American Army. Since the relations between our two countries are quite friendly I am sure that my service here will in no way be looked upon as subversive but rather as an alternative.

It is in light of the abovementioned facts that I come to you today with a sincere request that you do all in you power to have the charges against me dropped.

Thank you for your attention,

Sincerely yours

A handwritten signature in cursive script, appearing to read "Sidney Salzmänn", followed by a horizontal line.

Sidney Salzmänn



AFFIDAVIT

UNITED STATES v. SIDNEY E. SALZMANN

- 72 CR-740

THOMAS R. MAHER, being duly sworn, deposes and says that he is an Assistant U. S. Attorney and familiar with the above entitled cases and the procedures under which prosecution was instituted.

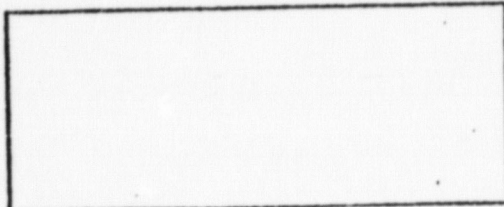
In all of the foregoing cases wherein charges arose from failure to comply with an induction order, the institution of the prosecutorial action was brought about by the Local Board sending to the U.S. Attorney a Delinquent Registrant Report, (SSS Form 301) a blank copy of which is attached hereto.

A copy of this report was then forwarded to the FBI and an investigation was commenced.

Upon information and belief, there was no request from the Director of Selective Service with regard to any of the above mentioned cases, in exercise of the provision under 50 U.S.C. App. 462 (c), that these cases be processed as expeditiously as possible.

5/  
THOMAS R. MAHER  
Assistant U. S. Attorney

Sworn to before me this  
11th day of November 1974.



(Local Board Stamp)



(Date)

TO: \_\_\_\_\_

## 1. IDENTIFICATION OF REGISTRANT:

Full name of registrant: (last, first, middle)				Alias (if any)	
Last known address: (number and street or RFD route-city, town, or village-county-state-ZIP code)					Last known telephone number:
Selective Service Number		Social Security Number		Selective Service Classification:	
Color of eyes:	Color of hair:	Height:	Weight:	Other obvious physical characteristics:	
Date and place of birth:			Date of registration:		Place of registration:
Prior military service: (Armed Force)		(Service number)		(Date of entry)	
(Name of last organization)				(Date of separation)	
This registrant has a court record as follows:					
Offense	Date of Conviction (Month, day, year)		Court (Name and location)		Sentence

## 2. OFFENSES:

This registrant violated an order of this Local Board (check applicable box)

☐ Order to Report for Induction (SSS Form 252).

He committed this violation by (check applicable box)

☐ Failing to report for induction.☐ Reporting for induction but failing or refusing to submit to induction into the Armed Forces at the Armed Forces Examining and Entrance Station located at \_\_\_\_\_

\_\_\_\_\_ (Address)  
 The order indicated was mailed on \_\_\_\_\_ to this registrant at \_\_\_\_\_  
 \_\_\_\_\_ (Date of mailing)

\_\_\_\_\_ (Address) to report on \_\_\_\_\_ (Date)

This registrant failed to perform the following duties at the times indicated:

DUTIES

DATES



The person who will always know the registrant's address is \_\_\_\_\_ (Name)  
\_\_\_\_\_. This person \_\_\_\_\_ (Has, has not) been contacted by  
\_\_\_\_\_. (Address)  
\_\_\_\_\_ on \_\_\_\_\_ (Date) with the following result \_\_\_\_\_  
(Letter, telephone, in person)

The registrant's last known place of employment or business is \_\_\_\_\_ (Name)  
\_\_\_\_\_. His employer \_\_\_\_\_ (Has, has not) been contacted by  
\_\_\_\_\_. (Address) (Telephone number)  
\_\_\_\_\_ on \_\_\_\_\_ (Date) with the following result \_\_\_\_\_  
(Letter, telephone, in person)

4. Mail directed to the registrant \_\_\_\_\_ returned by the post office.  
(Is, is not)

5. REMARKS: (Include additional efforts to locate registrant or names of individuals who may know whereabouts of the registrant)

6. FUTURE INFORMATION:

You will be advised promptly by letter of any change in this registrant's status and of any additional facts which may come to the attention of this board concerning his whereabouts or which may aid you in apprehending and prosecuting him.

\_\_\_\_\_  
Authorized Signature

3 -----X

4 UNITED STATES OF AMERICA,

5 Plaintiff,

6 - against -

CR 434 56  
(1954)

7 HOWARD G. LOCKWOOD,

8 Defendant,

9 -----X

10

United States Courthouse  
Brooklyn, New York

11

12

September 20, 1954  
10:00 A.M.

13

14

15 B e f o r e

HON. JACK B. WEINSTEIN, U. S. D. J.

17

18

19

20

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22

23

ILENE GINSBERG  
ACTING OFFICIAL COURT REPORTER

24

25

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1  
2 to make sure these cases are not forgotten.

3           There have been cases in the past, fugitive  
4 cases, that I have called where it appeared to me  
5 that the assistant in charge of the case had forgotten  
6 the case and as I recall, in one instance, the defen-  
7 dant fugitive was actually incarcerated.

8           Now, these are not statistics. These are real  
9 cases which I expect to be prosecuted promptly.

10           MR. KORMAN: We are ready to prosecute them  
11 as soon as Mr. Lusky will present his clients.

12           I think that there are thousands of fugitives  
13 and there are limitations to the extent to which the  
14 United States can obligate itself as to how many it  
15 can bring before the Court for trial when there is  
16 substantial reason to believe they have voluntarily  
17 absented themselves.

18           I again go back to the fact that since your  
19 Honor has no power to enter an order adverse -- that  
20 could possibly be binding in any way on any defendant  
21 who is not present -- there is no case in controversy.

22           As Mr. Justice Frankfurter said in the dissenting  
23 opinion in the Eisler case in which at least there,  
24 there was a theoretical possibility that the order  
25 would be binding if Mr. Eisler ever returned --

129

EASTERN DISTRICT OF NEW YORK

2

2

72-CR-740

:

September 19, 1975  
9:30 o'clock A.M.

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

ON TO DISMISS, ETC.

I hereby certify that the foregoing is a true and accurate transcription of the stenographic notes in this proceeding.

*Samuel J. Shaw*  
Official Court Reporter  
U.S. District Court for the  
Eastern District of N.Y.

DANIEL D. SIMON  
OFFICIAL COURT REPORTER



1 especially in Israel which is the historic homeland  
2 of my people. On the other hand, having been born in  
3 the United States I feel U.S. citizenship to be my  
4 privilege and in no way wish to reject it...."

5 Then he goes on to say he expects to serve in  
6 their army.

7 Now, the point of our motion is not that --  
8 I do not know one way or the other whether Mr. Salzman  
9 really lacked the money to get to Brooklyn for  
10 induction. I know what he says. But Mr. Maher is  
11 quite right in saying it is a self-serving declaration.  
12 He refers to the fact if you spend money outside the  
13 country for travel you have to pay for it in foreign  
14 currency, in U.S. currency, or else there is an  
15 exorbitant tax laid by Israel if you use Israel  
16 money for such purposes. I haven't checked that. It  
17 may or may not be an accurate statement. But in any  
18 case the truth or falsity of these facts is not in  
19 issue. The significance of them is of the case as it  
20 was represented to be by the applicant, by the  
21 registrant who was a person who was not unwilling to  
22 be inducted but lacked the money to do it. And there  
23 was nothing down to the middle of 1971 that the  
24 Government could do about that -- that the U.S.  
25 Attorney could do about it. But at that point,

131 12

1 presumably because there had been a number of cases of  
2 this kind, the Selective Service regulations were  
3 changed and the Government, the Selective Service  
4 System, by arrangement with the military saw to it  
5 that a person who was overseas and was ordered to  
6 report for induction would be transported at  
7 Government expense from the military air base nearest  
8 to his home -- first to a collecting point, I think --  
9 and then back to the States. If he were rejected there  
10 for some reason at the induction center he would be  
11 transported back to the military base where he  
12 started.

13 Now, this is the kind of thing which in the  
14 ordinary -- if the Government is looking at these  
15 people as being prima facie unreliable and prima  
16 facie evaders, and is just unwilling to look at them  
17 one by one and take account of letters of the kind  
18 from which I read excerpts, why then, I suppose they  
19 could say, "Well, let him find out about the  
20 regulations for himself." But considering the fact  
21 -- I mean our basic contention is that the Government,  
22 including the U.S. Attorney's Office, is obligated to  
23 deal with these cases as individual matters. They  
24 involve possible felonies, that is, which will plague  
25 a man for his life. And that under those



1 circumstances, knowing that the money problem was what  
2 he said, the least that they could have done, it seems  
3 to me, was to tell him that there now was a way for  
4 him to get home. I do not know where the nearest  
5 U.S. air base was to his home, maybe out in Turkey  
6 some place. But this was a material change in the  
7 regulations. Material on the facts as they had been  
8 represented to the Government by this registrant.

9 Now, the contention here is really funda-  
10 mentally the same as in the Friedman case. The  
11 question is whether the Government was on notice of  
12 facts and of changes in the law which the Government  
13 like everybody else is presumed to know probably and  
14 does know actually, at least the Department of  
15 Justice does, when there are changes in the  
16 regulations in the Government criminal cases that are  
17 pending. That enough had come to their knowledge so  
18 that ordinary consideration to an individual should  
19 have allowed them to tell him about this difference,  
20 I think, this new regulation. And if he hadn't come  
21 home then, well, why, all right. But nobody knows  
22 whether he would have or not.

23 As I say, it is the same question whether they  
24 were on notice with sufficient facts to tell him that  
25 he could very easily bring himself within their

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA :  
against :  
SIDNEY E. SALZMANN, : 72 CR 740  
Defendant :  
-----X

United States Courthouse  
Brooklyn, New York  
May 6, 1976  
9:30 a.m.

B e f o r e:

HONORABLE JACK B. WEINSTEIN,

U. S. D. J.

SHELDON SILVERMAN  
Official Court Reporter



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Appearance:

DAVID G. TRAGER, Esq.  
United States Attorney for the  
Eastern District of New York

By: THOMAS MAHER, Esq.  
Assistant U.S. Attorney

LOUIS LUSKY, Esq.  
Attorney for Defendant

1 MR. LUSKY: May it please the Court--

2 THE COURT: You're appointed. You still  
3 haven't--

4 MR. LUSKY: I have not threaded my way through  
5 the red tape that's involved in applying--

6 THE COURT: It's very simple. I hate to  
7 see you come down this way without getting paid for  
8 your time. It makes complications with respect to  
9 my ability to order minutes and the like.

10 MR. LUSKY: Your Honor, I'll tell you--  
11 Off the record.

12 THE COURT: I can't hear you off the record.

13 MR. LUSKY: The fact of the matter is that  
14 the filing of a request of appointment to the court  
15 is a very simple thing and I could do that with no  
16 trouble. The only reason I have not done it is that  
17 I believe that back around 1939 or 1940 I became a  
18 member of the bar of this court. The records ap-  
19 parently are not complete that far back. I cannot  
20 find any trace of it. I do not really feel like  
21 paying the fee involved and becoming a member of  
22 the bar of this district court.

23 THE COURT: We'll ask the Clerk of the Court  
24 to come up. If he's not here, have the Deputy  
25 Clerk come up.



1 MR. LUSKY: I may say I've got in touch with  
2 my old firm, Root, Clark, Butler & Ballentine, which  
3 is now name Dewey, Ballentine, Bushby, Palmer and  
4 Wood, in Manhattan, and asked them to look back in  
5 their records because they customarily paid the  
6 bar admission fees of the young attorneys there.

7 THE COURT: We'll take care of it.

8 MR. LUSKY: As far as the application for  
9 reimbursement and fee is concerned, I must advise  
10 your Honor that this is not a simple matter. My  
11 secretary has been working on these papers off and  
12 on for months. The problem that I'm appointed in  
13 twenty-six cases, the requirements are for very  
14 exact time records, which I have got, but not in the  
15 proper form. They're mixed in.

16 THE COURT: Let's get one thing done at a  
17 time. We'll get you admitted, apply to be admitted.  
18 I'll appoint you in this case.

19 MR. LUSKY: You have by order of the Court  
20 appointed me counsel. You have not put me on the  
21 panel.

22 THE COURT: I'll appoint you under the plan  
23 in this case. Then you just -- it's a very simple  
24 form. Do the best you can with it. Nobody is going  
25 to require certified records.

1 MR. LUSKY: I explained to you this obviously  
2 is not a reimbursable expense. I didn't want to pay  
3 the \$25, frankly. I think it's been paid. I found  
4 my admission record to the Southern District, but  
5 I haven't found the certificate that I think was  
6 issued to this court approximately thirty-six years  
7 ago.

8 THE COURT: We have an affidavit indicating  
9 he doesn't have the money to come here. The form is  
10 a simple one. You can estimate the hours as best  
11 you can. Nobody is going to ask for certified  
12 copies of time.

13 MR. LUSKY: That's not the way the form reads.  
14 I'm afraid the responsibility for cutting my corners  
15 square is not one that you can relieve me of.

16 THE COURT: You can cut your corners square,  
17 but I don't want certificates. You do whatever you  
18 want. I'll see that you get admitted.

19 MR. LUSKY: The admission will take care of  
20 ordering the minutes, won't it? Or will it? The  
21 fact is I have the affidavit, financial affidavit,  
22 from Mr. Salzman. I don't think I filed it. If  
23 you like I will file it. I don't have it here.

24 THE COURT: Submit an order and I'll sign it  
25 pursuant to the Act for furnishing of transcript.



1 The Government pays fifty percent and we'll pay  
2 fifty percent under the plan.

3 MR. MAHER: Yes.

4 THE COURT: That will relieve you of the  
5 problem of red tape.

6 Could we get to the merits?

7 MR. LUSKY: The merits of the motion. The  
8 motion is for discovery and inspection and for a  
9 copy of the grand jury minutes, two separate motions.  
10 Combine them for convenience, but they have nothing  
11 really to do with each other.

12 The Court will recall very quickly after my  
13 appointment as counsel in this and other cases on  
14 September 10, 1974, I filed a motion to dismiss on  
15 speedy trial grounds, among others. That motion was  
16 filed September 20th. It was supported by a long  
17 memorandum, which is in the file. It was filed in  
18 twenty-six cases, if it's not in the file in this  
19 particular case, I have an extra copy here that we can  
20 put in this case's file.

21 That motion was made on Sixth Amendment  
22 grounds only.

23 I want to make this clear about the motion  
24 because there's been a certain amount of confusion  
25 over the course of the last year and a half or so

is underlined, adds up to an unconstitutional 7  
1 about the speedy trial position. 139

2 That first brief was filed under extreme time  
3 pressure, was filed, as I say, in a period of ten  
4 days, your Honor probably will remember it's  
5 quite a substantial brief.

6 During that same ten days it was necessary  
7 for me to deal with an attack upon my appointment  
8 that's been made by the United States Attorney.

9 (Mr. Orgel enters the courtroom.)

10 THE COURT: Thank you very much for coming up.  
11 I believe you know Mr. Lusky.

12 MR. ORGEL: Yes.

13 MR. LUSKY: I don't know you.

14 MR. ORGEL: Clerk of the Court and distinguished  
15 Alumni of Columbia.

16 THE COURT: We have a problem here. Mr. Lusky was  
17 admitted to the court prior to 1940. There are no  
18 records of his admission.

19 MR. ORGEL: No records of his admission.

20 THE COURT: Apparently.

21 MR. LUSKY: Mr. Sacco told me they were  
22 fragmentary, did not disclose my name, but that  
23 wasn't conclusive that it hadn't happened; is that  
24 correct?

25 THE CLERK: The records were already searched.



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MR. ORGEL: She did search them.

THE CLERK: As far back as I went.

MR. ORGEL: When was this?

MR. LUSKY: September, 1974.

MR. ORGAL: Couldn't find them.

THE CLERK: I searched myself, couldn't find them.

MR. ORGEL: Do you have a date?

MR. LUSKY: No, I don't. As I explained to the Court, I worked for a large downtown, New York, firm at the time. They had the practice of getting a number of their associates admitted in the local district courts without reference as to specific cases. I found my certificate of admission in the Southern District. I searched all my papers, can't find that certificate of admission here. Their financial records which show the payment of fee at that time do not go back that far.

THE COURT: Based on the information available the fee will be waived, the additional fee to be waived. You'll issue a certificate, please, to Mr. Lusky based on the seriousness of admission.

MR. ORGEL: Can I get an order from you?

THE COURT: I'm giving you it now.

MR. ORGEL: I need a written one.

1 THE COURT: Have one of your people ~~141~~ <sup>141</sup> it  
2 out, that you find acceptable and I'll sign it.

3 Thanks very much.

4 MR. ORGEL: As of when?

5 THE COURT: As of today. The order will be  
6 today--

7 MR. LUSKY: September 10, 1974 was your order  
8 appointing me.

9 THE COURT: September 10-- What was the date  
10 of admission, approximately?

11 MR. LUSKY: Approximately 1939.

12 THE COURT: Make it as of January 1st, 1939.

13 MR. LUSKY: We should make it a business date.

14 MR. ORGEL: The admission, January--

15 THE COURT: Issue a certificate indicating  
16 he was admitted as of -- if you don't need a specific  
17 date, as of 1939.

18 MR. LUSKY: On or about.

19 THE COURT: On or about January 1st, 1939.

20 MR. ORGEL: I'll have to have some kind of  
21 factual finding from you.

22 THE COURT: I so find.

23 MR. ORGEL: That he was admitted?

24 THE COURT: On or about January 1st, 1939.

25 MR. ORGEL: An alternative may be to simply



1 get a certificate of good standing from the Southern  
2 District.

3 MR. LUSKY: I can do that.

4 THE COURT: I want to get this out of the way  
5 because I want to go forward with this case.

6 MR. ORGEL: You can go forward with the case.  
7 It wn't--

8 THE COURT: I prefer to do it this way.

9 MR. ORGEL: What's the date, on or about?

10 THE COURT: January 1st, 1939.

11 MR. ORGEL: Very well.

12 THE COURT: Send up an order and I'll sign it.  
13 Thanks very much.

14 MR. ORGEL: You're welcome, your Honor.

15 THE COURT: I knew if anybody could cut through the red  
16 tape, you could do it.

17 MR. ORGEL: It's not a matter of red tape,  
18 but a matter of appropriate procedure, according to  
19 Weinstein, by analogy from Weinstein's rules of  
20 procedure.

21 THE COURT: They're flexible.

22 MR. LUSKY: There should be a document--

23 THE COURT: Except there's no document.

24 Thank you, Mr. Orgel.

25 MR. LUSKY: Good to meet you, Mr. Orgel.

1 MR. ORGEL: Nice to see you.

2 MR. LUSKY: What I was doing, I've referred  
3 to the fact there's been a certain amount of con-  
4 fusion as to the position that we take on speedy  
5 trial, and I was saying that in that ten days between  
6 September 10 and September 20, when the motion for  
7 dismissal and the memorandum of support of it were  
8 filed, I had -- I was very hard-pressed not only  
9 by my regular job at the law school, but also and  
10 not only by this rather extensive brief in support  
11 of the motion to dismiss, but also an equally sizable  
12 memorandum supporting the court's power to appoint  
13 me. That had been presented by the U.S. Attorney  
14 in a letter to the Court and it was pressed at the  
15 time I appeared on September 20, 1974.

16 There was a possibility that the Court would  
17 agree with the U.S. Attorney, in which case although  
18 I had been counsel, I would lose that status on  
19 that day. It was therefore important, I thought, to  
20 get this motion and memorandum filed at that time.  
21 That was the reason for the great rush.

22 In this memorandum we took a position that  
23 has haunted this case ever since. It's one that  
24 we receded from very quickly. The position that's  
25 stated in this brief is that the Government has an



1 affirmative obligation to pursue all indicted or  
2 accused felons, or indicted persons to the extent  
3 of its ability and that, a question about that and  
4 an opposition was raised by Michael Tiger, who  
5 was then acting as a friend of the Court.

6 At that point, after receiving Mr. Tiger's  
7 brief, and he had not raised the question with me  
8 in any way before he filed his brief, we filed a  
9 reply brief, which receded from that position and  
10 took the position that we have adopted ever since.  
11 This is the reply memorandum.

12 In that preliminary memorandum we took the  
13 position not that there is an absolute duty on the  
14 Government to pursue all defendants relentlessly  
15 in criminal cases, indictment cases, but that the  
16 Government is constitutionally unable to use in-  
17 dictments as an instrument of exile by adopting a  
18 policy and allowing the policy to become known that  
19 a particular class of indicted persons, namely,  
20 Selective Service defendants, would not be brought  
21 back to this country except under extradition treaties,  
22 whereas the contrasting practice in other types of  
23 felony cases, what I call ordinary criminal cases,  
24 narcotics, bank robberies, so on, that in those cases  
25 the Government does pursue defendants whose whereabouts

1 it knows in other countries regardless of the  
2 existence of an extradition treaty. That is  
3 supported by authorities which were filed in an  
4 appendix to the motion to dismiss, and it is also  
5 supported by other authorities that I've cited in  
6 the petition for certiorari.

7 That raises a question of fact as to what  
8 the Government's policy with respect to absent  
9 Selective Service defendants is, and it has the  
10 factual question that we're trying, that I'm trying  
11 to get some light on before proceeding to file a  
12 brief, a further brief, on the speedy trial points,  
13 not only constitutional, but also under the Eastern  
14 District plan for expedition of cases.

15 As invited by this Court on January 6th,  
16 I thought it would be much better and much more in  
17 line with the court policy in deciding these cases  
18 on the basis of a concrete record if we could  
19 develop these facts before the brief itself was  
20 submitted.

21 As a preliminary to that, back in March,  
22 after a fair amount of research on the substantive  
23 and procedural points, I served on the Government  
24 pursuant to Rule 16(a)(1)(c), I think of the  
25 Criminal Rules, a request to produce certain docu-



1           ments and permit inspection of them.

2           I should say parenthetically that as long  
3           ago as November 1974, a similar request had been  
4           submitted with respect to all twenty-six of the  
5           cases. It's not that paper, but one that looks  
6           like it (indicating). Well, it's not important  
7           to show it to you, but you undoubtedly recall it.  
8           I filed a copy in the court.

9           I did not at that time move for discovery  
10          and inspection, but I made it known to the Court  
11          the possible pertinence of these facts as to the  
12          Government's policy and practice and in effect so  
13          that the Court pursue it on its own motion or I would  
14          file a motion if the court decided that it was  
15          desirable.

16          On November 26th, 1974, however, the Court  
17          denied the motion to dismiss without prejudice,  
18          saying that it was better to consider the case in  
19          the context and the other cases in the context of  
20          the Selective Service -- of the concrete records,  
21          the actual detailed facts of the case.

22          Then at about the same time, shortly before,  
23          I believe, your Honor may remember that you directed  
24          the Government to turn over the Selective Service  
25          files, copies of them, to me. The Government then

1 took to the Second Circuit Court of Appeals the  
2 question whether the procedure was beyond the power  
3 of the Court and obtained a partial but not a com-  
4 plete success.

5 The Court of Appeals held that I could do what  
6 your Honor had invited me to do on cases where the  
7 defendants had specifically authorized me to repre-  
8 sent them, but that I could not do it for other  
9 defendants.

10 I then took the first three defendants who  
11 had authorized me, Nolan, Friedman and Salzman, and  
12 on September 19th last, moved for the dismissal of  
13 those three cases.

14 The Nolan and Friedman cases were dismissed  
15 on that day, one on the Government's, with acquies-  
16 cence of the Government and the other by order of  
17 the court. The decision was reserved in the Salz-  
18 mann case, the case of the defendant who has gone to  
19 Israel.

20 Then, if the Court will recall, there was  
21 invitations for further briefs to be filed in Decem-  
22 ber, and on January 6th the court made a further in-  
23 vitation for further briefs on specifically the speedy  
24 trial point. That's the one that we wrote the Court  
25 that we wanted to file, but we're waiting to file it



1 until we do whatever we can to develop the factual  
2 points involved in our request for discovery and  
3 inspection.

4 As is pointed out in our memorandum in  
5 support of the present motion, there's been a recent  
6 change in the discovery rule. It used to be, down  
7 to a date in 1975 when the amendment went into  
8 effect, it used to be that you proceeded with this  
9 by motion. Now, for reasons that are well set out  
10 in the advisory committee's notes -- and which are  
11 quoted in my memorandum in support of the motion --  
12 the rule has been amended so as to relieve the  
13 court in all possible cases of the need of passing  
14 on these questions.

15 The procedure under the new rule -- I have  
16 it, your Honor, if you would like to see it --

17 THE COURT: No, it's not necessary.

18 MR. LUSKY: The procedure under the new rule  
19 is that you do not come to the court unless there is  
20 a pending dispute between the defendant and the  
21 Government as to what the Government's obligated to  
22 produce.

23 We filed, and the advisory committee says  
24 that the reason for the rule change is that they  
25 want counsel to work this out amongst themselves

1 as well as they can and not bother the court unless  
2 they come to an impasse.

3 We have briefed very thoroughly in our briefs  
4 filed in this court, and more specifically in our  
5 petition for certiorari in the Supreme Court, the  
6 speedy trial, the constitutional speedy trial point  
7 to which these papers are relevant.

8 It is also relevant, as I'll point out in a  
9 moment, to the Eastern District plan, a point that  
10 the Court has asked us, invited us, to submit a  
11 brief on.

12 In the petition for certiorari, it is  
13 probably the best and most succinct statement of  
14 our speedy trial position as revised by our reply  
15 memorandum, and for the convenience of the Court  
16 and opposing counsel I have here multilith excerpts  
17 from the certiorari petition. They are marked.  
18 I originally intended to file them with the motion  
19 but I'll hand them up. They are papers that you  
20 already have. That's an actual direct copy of pages  
21 13 through 23 of the petition for certiorari.

22 If the Court would prefer it, I could give  
23 you both Xeroxes of the whole petitions of certiorari.  
24 You can keep them both.

25 THE COURT: Thank you. See that they are



1 docketed and brought back to me in this very case,  
2 filed.

3 MR. LUSKY: I don't intend in my argument in  
4 chief to go any further into the substance of the  
5 speedy trial point because, as pointed out in our  
6 memorandum in support of the present motion, this  
7 speedy trial question is obviously a substantial  
8 question. The Court has explicitly recognized it  
9 to be substantial in its January 6th memorandum in-  
10 viting further briefs.

11 In my view of the case, that is enough to  
12 justify discovery. If the Court believes the ques-  
13 tion is substantial and if the Court further believes  
14 that it is helpful to decide the question in the  
15 context of the specific surrounding facts, both on  
16 the defendant's side insofar as the Selective Ser-  
17 vice file shows them, and on the Government's file  
18 insofar as subject to a motion to produce for  
19 inspection, that settles the question.

20 It is also our view the present Rule 16,  
21 interpreted in the light of legislative history  
22 means that when a non-frivolous request for dis-  
23 covery and inspection is sent to the Government  
24 they are obligated either to comply with it or to  
25 submit a reasoned opposition to it. They have not

1 done that. They have done neither.

2 What they did, Mr. Maher here on April 5th  
3 wrote a letter which is attached as an exhibit to  
4 your motion, which I will just read. It's very short.

5 Addressed to me: "In light of all the  
6 circumstances of the above matter and the limita-  
7 tions imposed by Rule 16(a)(2) and 16(a)(1)(c)  
8 of the Rules of Criminal Procedure, cooperation  
9 with your request for discovery of March 20, 1976,  
10 does not appear to be warranted. Very truly  
11 yours, Thomas A. Maher."

12 That was clearly an impasse. There was  
13 nothing more that we could do. It was not a state-  
14 ment -- I could guess what their exact points were,  
15 and I undertook to do so in the memorandum that  
16 we filed in support of our motion.

17 This morning Mr. Maher has handed me, and  
18 I assume a copy to the Court, a memorandum stating  
19 more explicitly their position. I have had an  
20 opportunity to read it while the other cases were  
21 being argued.

22 I would like, if I might, to respond to a  
23 couple of the points that are made in it. Does  
24 your Honor have the memorandum yet?

25 THE COURT: I do.



1 MR. LUSKY: At page 9, second full paragraph,  
2 the memorandum says, "The defendant has repeated  
3 his assertion that such defendants should not have  
4 been left unmolested in these foreign countries.  
5 He thus denies to them any right to seek the pro-  
6 tection of countries which do not have extradition  
7 agreements with the United States."

8 As I have already pointed out, that is not --  
9 has not been our position for over a year and a  
10 half, approximately a year and a half. On the  
11 original -- in the original memorandum filed in  
12 support of our motion to dismiss by September 19th,  
13 at page 17, this paragraph appears: "We do not" --

14 I'm starting with the second sentence of  
15 Paragraph F, bottom half of the page. We do not  
16 contend that the Government has a duty to "seek out  
17 the defendants with all the investigative resources  
18 at its command and to summon before a grand jury  
19 parents, relatives, and friends, to testify as to  
20 the whereabouts of the accused."

21 What we contend is that the Government's  
22 settled practice of leaving alleged draft violators  
23 unmolested while they remain in exile, while at the  
24 same time pursuing vigorously other persons outside  
25 the United States, whether or not they are reachable

1 under an extradition treaty" and that "while" clause  
2 is underlined, "adds up to an unconstitutional  
3 practice of exiling draft violators through  
4 executive action. For a fuller statement of our  
5 position, we refer the Court to page 17 to 19 of  
6 our aforesaid petition for certiorari, et al.,  
7 Austin v. the United States."

8 The Government is clinging, still, to a non-  
9 position. I just didn't want the confusion to  
10 affect the Court's thinking about the matter.

11 At page 10 of the memo that the Government  
12 filed today, the Government makes reference to the  
13 exemptions in Criminal Rule 16(a)(2) for reports,  
14 memoranda, or other internal Government documents  
15 made by the attorney for the Government or other  
16 Government agents in connection with the investiga-  
17 tion or prosecution of the case.

18 We recognize that that exempts the Government  
19 from the duty of producing any investigative  
20 documents involved in this case, although we believe  
21 that there are not -- we do not believe there are  
22 any investigative documents reflecting any effort  
23 to get Mr. Salzman back from Israel. We know of no  
24 such effort. The Government has never claimed there  
25 was an effort. Our position is that there are no



1 such papers.

2 That relates to Paragraph 1 of our request,  
3 which we expect to produce nothing because we don't  
4 think there is anything.

5 As for the remaining four paragraphs of the  
6 request, they relate to other cases, and if, as the  
7 Government intimates, we may be calling for documents  
8 that would invade somebody's privacy, that Rule 16  
9 sets up the appropriate procedure for the Government,  
10 which is a motion for a protective order, not a  
11 virtual unexplained refusal to comply with any  
12 part of the order.

13 Finally, at page 12 of the Government's brief,  
14 they make a point which has not surfaced before.  
15 Nine lines from the bottom of the page, page 12,  
16 the Government says -- I'll start with Paragraph  
17 1A, a little farther up: "that the motion is pre-  
18 mature" -- our motion is premature -- "coming as  
19 it does before arraignment, while the defendant  
20 is beyond the reach of this court, which in itself  
21 would preclude the Government from any reciprocal  
22 rights to discovery as envisioned under Rule 16."

23 I do not mind a bit if the Government wants  
24 to discover something. I don't mind receiving a  
25 request for discovery, and I'll deal with it in the

1 way I think the rule requires, which is either to  
2 comply with it or explain why not. I will undertake  
3 to induce my client to comply with any request that  
4 I think is well founded or the Court decides is well  
5 founded. I think I can. I think he will comply.

6 That has nothing to do with the present motion.  
7 If the Government-- I doubt the Government really  
8 wants to find anything out about Salzman. If it  
9 does, and if it's material to this case, why, then  
10 the thing to do is file a request under Rule 16 as  
11 I have done.

12 THE COURT: If I may interrupt: What specific  
13 language in Rule 16 do you rely upon, because the  
14 rule is written in a very narrow way--

15 MR. LUSKY: I'll respond to that. Information  
16 subject to disclosure is 16(a)(1) and the specific  
17 language is (a)(1)(c). "Upon request of the  
18 defendant the Government shall permit the defendant  
19 to inspect and copy or photograph books, papers,  
20 documents...which is in the possession, custody,  
21 control of the Government and which are material to  
22 the preparation of his defense."

23 THE COURT: I see. .

24 MR. LUSKY: That is the language. If your  
25 Honor will look in that same book, that your Honor

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1 has got there (indicating), U.S.C. -- I'm sorry,  
2 relating to Rule 16, at page 16-365, the first two  
3 full paragraphs on the page, your Honor will find  
4 the legislative history that I'm referring to.

5 In our memorandums supporting the motion  
6 which the Clerk has, we have -- and I don't see any  
7 point in repeating it -- we have said first, and  
8 I think it's true, that we believe the Court would  
9 be justified in entering an order of compliance  
10 summarily, because of the fact the Government has not  
11 complied with its obligation in any timely way, to  
12 state the grounds of its opposition; however, in  
13 view of the fact that they've submitted a memorandum  
14 even today, I imagine your Honor wouldn't want to  
15 go on that ground.

16 Therefore, we also state in the memorandum  
17 the alternative ground, that it is a sufficient basis  
18 for this discovery motion, which is very carefully  
19 and narrowly drawn so as not to be burdensome to the  
20 Government. There's been no specific objection to  
21 any part of it, no request for a protective order,  
22 or complaint about any language in it, in the  
23 request; that if it is a substantial defense, which  
24 the Court has recognized the speedy trial defense  
25 to be, and if the requested papers are material to

1 it, which I am willing to argue if there's any  
2 question about it, that we should have access to  
3 the papers.

4 There is a third level on which this motion  
5 could be argued. I'm not going to do it in my  
6 case in chief. I won't do it later unless the  
7 Court directs, and that is to get into the whole  
8 legal question not as to whether the speedy trial  
9 points are substantial, but whether they are legally  
10 correct. If we get into that we're going to have a  
11 pretty long argument.

12 THE COURT: I don't want that. I want a brief  
13 on that.

14 MR. LUSKY: Your Honor has gotten several  
15 briefs on that from me.

16 THE COURT: I know.

17 MR. LUSKY: I don't think the Government  
18 has actually filed it although they have touched,  
19 dealt with the point somewhat in this memo.

20 THE COURT: Yes.

21 MR. LUSKY: That is all I have on the  
22 discovery point, and I'll either go on now with the  
23 grand jury minutes point or wait until your Honor  
24 hears the Government on it, the discovery point.

25 THE COURT: I don't want to hear argument on



1 the grand jury point. I'm not going to grant the  
2 grand jury point. I'm going to assume the only  
3 thing before the grand jury were the minutes that  
4 you already have.

5 MR. MAHER: Selective Service minutes.

6 MR. LUSKY: I'll brief the case on that  
7 assumption. I will do that. I have briefed it on  
8 that assumption.

9 THE COURT: That is an assumption that is sound  
10 in view of the practice in this court.

11 MR. LUSKY: All right.

12 MR. MAHER: At the outside I would like to  
13 inquire about this affidavit of the defendant with  
14 regard to insufficient funds. I haven't seen any  
15 affidavit.

16 MR. LUSKY: You have not. I got it in my  
17 office; I've had it for a long, long time. I was  
18 going to file it with those big forms I have to  
19 file, but I would be glad to mail it to you this  
20 afternoon with a copy to the Court, with a copy to  
21 Mr. Maher.

22 MR. MAHER: The reason I mentioned perhaps  
23 was just a bad choice of words, your Honor had  
24 mentioned there is an affidavit in the file with  
25 regard that he wasn't able to come here. That was

1 a letter.

2 THE COURT: A letter, but file the affidavit  
3 then because it may have a bearing on the substan-  
4 tive as well as the procedural.

5 MR. LUSKY: I'll do that.

6 MR. MAHER: With regard to the discovery  
7 moved by defense counsel, we do feel that we are  
8 entitled to rely upon the rituals spelled out in  
9 Rule 12; in other words, discovery shouldn't be had  
10 until arraignment. Rule 12, previously in Rule 16,  
11 your Honor.

12 THE COURT: What language in particular?

13 MR. MAHER: I have in my memorandum, Point 1  
14 on page 5. Rule 12 sets forth, talks about all  
15 types of motions, all pretrial motions: "Unless other-  
16 wise provided by local rule, the Court may at the  
17 time of the arraignment or as soon thereafter as  
18 practicable set a time for making a pretrial motion  
19 or request. If required a later date of hearing."  
20 Former Rule 16 said, perhaps more appropriately,  
21 "A motion under this rule may be made only within  
22 ten days after arraignment or at such reasonable  
23 later time as the Court may permit."

24 THE COURT: That's an outside limit which  
25 terminates the right to make motions. It doesn't



1 state when the right to make motions begins.

2 MR. MAHER: It does say that at arraignment.  
3 I realize I'm relying on perhaps -- well, in this  
4 case the Government should be permitted to do that  
5 when you have a situation such as this when a person  
6 is a fugitive for so many years.

7 THE COURT: It makes no sense to utilize that  
8 analysis in this case. I don't rule it's not a  
9 proper analysis in other cases, but where the very  
10 issue in the case is whether the fugitive status  
11 affects the speedy trial right. Your interpreta-  
12 tion would prevent the defendant from raising the  
13 point that he now seeks to raise as his crucial  
14 point in the case. You cannot, in my opinion, by  
15 interpreting the rule as you suggest in a case  
16 like this, that's all I'm referring to -- prevent  
17 the Court from considering what the defendant  
18 believes to be an important motion. That may be  
19 an argument on appeal, but it's not one that I'll  
20 accept.

21 MR. MAHER: The only other reason for making  
22 this point, your Honor, if I may, is that the  
23 Government to some extent would be denied reciprocity  
24 envisioned by Rule 16, because the Court would be,  
25 while the person is a fugitive, beyond the reach of

1 the court. The court wouldn't be able to effectively  
2 enforce the reciprocity.

3 THE COURT: That may well be so, but in the  
4 circumstances of this case I don't believe that it  
5 has any weight. I will be delighted to hear that  
6 kind of argument in the case where I believe the  
7 Government may be adversely affected, but I don't  
8 believe it has any impact here.

9 MR. MAHER: Our other point, your Honor, as  
10 Professor Lusky has indicated, Rule 16(a)(2) pre-  
11 cludes discovery of those documents, internal  
12 documents of the Government. The language in Rule  
13 16(a)(2) sets forth "reports, memorandums or other  
14 internal Government documents made by the attorney  
15 for the Government or other Government agents in  
16 connection with the investigation or prosecution  
17 of the case are not subject to discovery."

18 THE COURT: That's right, I agree. That  
19 should be so. I'm telling you that nothing of that  
20 kind need be turned over.

21 MR. MAHER: Are you referring, your Honor,  
22 to the documents with regard to this particular  
23 case--

24 THE COURT: For our point of our discussion  
25 now with regard to this particular case. I don't



1 believe anything of a confidential nature needs to  
2 be turned over.

3 MR. MAHER: This is not necessarily confi-  
4 dential in nature, as to between the defendant and  
5 the Government?

6 THE COURT: No, I mean with respect to any  
7 case. As to this case, anything that you have pre-  
8 pared yourself in connection with the case need  
9 not be turned over.

10 MR. MAHER: Also, Government agents?

11 THE COURT: That is correct, at this point.

12 MR. MAHER: I think, also, the same thing  
13 should hold true with regard to what guidelines may  
14 issue from the Attorney General's office in setting  
15 policy as to this case or any other type of case.

16 THE COURT: That I don't see.

17 MR. MAHER: There is internal aids to the  
18 prosecution, internal documents to aid the prosecu-  
19 tion.

20 THE COURT: The overall policy in connection  
21 with what cases will be prosecuted is obviously of  
22 a critical importance.

23 If you have, for example, an argument that  
24 a certain defendant is being discriminatorially  
25 prosecuted while all other defendants are allowed

1 to go free, and if there's a guideline saying that  
2 "We will not prosecute this type of case at all  
3 except if we want to get Mr. X," I think that may  
4 very well be something revealable.

5 MR. MAHER: With regard to the information  
6 being requested of other Selective Service cases  
7 and other types of cases--

8 THE COURT: What it comes down to, as I under-  
9 stand the position, are two types of questions, first  
10 at least the question that I would like to see  
11 answered: You have no extradition treaty with Israel.

12 MR. MAHER: We have an extradition agreement,  
13 your Honor. I said it in the brief. It lists many,  
14 many violations. It does not list Selective Service  
15 as an extraditable crime. It precludes any extradi-  
16 tion for political crimes. Selective Service viola-  
17 tions have many times been described as a political  
18 crime.

19 THE COURT: Has Israel ever taken the position  
20 that it's a political crime?

21 MR. MAHER: I don't know, your Honor.

22 THE COURT: Find out and let us know. If  
23 Israel has not so stated, I'm going to assume in  
24 deciding this motion that it is not a political  
25 crime so far as Israel is concerned. I would find



1 find it inconceivable that Israel would consider  
2 this a political crime in view of the fact that it  
3 has a very tough selective service law, has generally  
4 supported a strong American policy with respect to  
5 foreign affairs, and strong armed forces. Unless you  
6 can come up with something, I'm going to assume that  
7 Israel would not deny extradition on the grounds  
8 that this is a political crime.

9 Do you need a treaty in order to extradite?  
10 Can't any nation without a treaty automatically  
11 or in individual cases on request extradite people?

12 That leads me to the second question: Are  
13 there instances where you don't have an extradition  
14 treaty or you don't have a treaty which covers a  
15 crime where the Government has requested a foreign  
16 government to make available a person within its  
17 control where that government is cooperating? It  
18 seems to me we have had many cases in this court  
19 where foreign governments have put people that the  
20 United States wanted on airplanes going to the United  
21 States, just called them up and said, "They'll  
22 arrive." Practically, that's the way international  
23 affairs operates. You don't need an international  
24 treaty or agreement in order for a foreign govern-  
25 ment to pick up a citizen of this country or any

1 other country to ship them back.

2 MR. MAHER: I suggest to your Honor the  
3 Government is obligated to turn over to Mr. Lusky  
4 all the various types of efforts that we have made--

5 THE COURT: I want to know, as a matter of  
6 judicial notice what the policy is here, what the  
7 facts are, so I can decide this case.

8 MR. MAHER: Could I move to our other point?

9 If we really feel--

10 (Mr. Orgel enters the courtroom.)

11 THE COURT: Thank you, Mr. Orgel.

12 You've just proven, Mr. Orgel, that justice  
13 can move with great speed.

14 MR. ORGEL: That this is a government of laws.

15 MR. MAHER: My other point is, of course,  
16 to obtain any of these documents it must be material  
17 to the defense, and it's our position, has been all  
18 along, that this is not a defense. In other words,  
19 a fugitive is entitled, a fugitive in the position  
20 that Mr. Salzmman is, in other words, a person  
21 who is in Israel, has never made mention that he  
22 wants a trial, as a matter of fact, has continued,  
23 has said a number of times that he intends to stay  
24 in Israel--

25 THE COURT: I know. That's for me to decide.



1 I've decided it's a substantial issue and that in  
2 order to decide it I need this information. I've  
3 asked both sides to brief it for my convenience.

4 I have already decided it's a substantial  
5 issue. I want to decide which way it should go.  
6 I need the help of parties. I've called on them  
7 to brief it. I need this material not particularly  
8 as a matter of evidence; I need it really for  
9 purposes of taking judicial notice. I can take  
10 judicial notice through more inconvenient methods.  
11 I prefer to get the help of counsel in this respect.  
12 I don't believe it's a Rule 16 matter, but under  
13 Rule 16 I think the defendant would be entitled to  
14 it.

15 What I'm concerned with is getting this  
16 matter decided, because I don't want it hanging on  
17 any more.

18 What is it that the Government can make  
19 available through the State Department? I don't  
20 want to burden you or delay the decision unduly.  
21 I want to move ahead.

22 MR. MAHER: Your Honor, I don't think the  
23 Government would want to list case by case all  
24 the various efforts that I have made in each individual  
25 case, anything like that.

1 THE COURT: I don't think it's necessary.

2 MR. MAHER: Which was requested.

3 THE COURT: A general statement would be  
4 sufficient for my purposes.

5 MR. MAHER: General statement of the various  
6 means.

7 THE COURT: What the Government has been doing.  
8 I want to know, first, where there is no specific  
9 extradition agreement, as in the case of Israel,  
10 has the Government, upon request, obtained the  
11 delivery of fugitives.

12 MR. MAHER: That's in all types of violations?

13 THE COURT: Yes. I want to know, know  
14 specifically, whether you've done that with Israel.  
15 I want to know specifically whether you've ever had  
16 any indication from Israel that Israel considers  
17 this a political crime. If you don't have it, I'm  
18 going to assume it doesn't so find.

19 MR. MAHER: Germane to that would be also  
20 whether this Government considers it a political  
21 crime. If this Government considers it a political  
22 crime, they would not request it.

23 If you consider it a political crime, I would  
24 like to know that. That's the first political crime  
25 that this country has ever suggested.



1 MR. MAHER: I'm not suggesting it, you Honor.

2 THE COURT: I thought our position in inter-  
3 national affairs was that we had no political crimes  
4 in this country, but you may be right. Things have  
5 changed a lot.

6 I want to know whether the Government has made  
7 any efforts with respect to Selective Service fugi-  
8 tives either to extradite -- this is with other  
9 countries -- extradite or obtain their presence  
10 without extradition. I believe with that information  
11 I can decide, and the briefs, I can decide this motion.

12 Is there anything else that realistically  
13 I need? I don't want to burden the Government with  
14 a lot of unnecessary searching.

15 MR. LUSKY: Your Honor, if you're through--

16 MR. MAHER: I want to make one point with  
17 regard to the last request. That is, that your Honor  
18 may recall a case of Estraverra (ph), likewise a  
19 defendant and Mr. Berman took over the defense.  
20 He was extradited from Canada for a bank robbery and  
21 he was also under indictment with us. We brought  
22 him over here to be arraigned and to plead. Because  
23 of the treaty under which he was extradicted or in  
24 honor of that treaty, refused even arraignment.

25 THE COURT: The situation there, as I recall

1 it was the general law is that when you are extra-  
2 dited for one offense, they can't take advantage  
3 of your presence to prosecute you for another  
4 offense.

5 MR. MAHER: That's the treaty.

6 THE COURT: That's general common law, as  
7 I understand it, with respect to witnesses as well  
8 as defendants. I may be wrong here. There are cases  
9 going to pre-Colonial times.

10 MR. LUSKY: It's in the treaty--

11 THE COURT: Whether or not it's a part of  
12 international and common law, when the defendant  
13 got here he preferred, for his own reasons, to dis-  
14 pose of this case and he therefore waived any of  
15 his rights.

16 MR. MAHER: That was sometime after.

17 THE COURT: That's right. That's quite a  
18 difference. If you have such cases where you  
19 extradited people for other crimes, you can give me  
20 that information. I'm not precluding you from giving  
21 me any other information you want to give me, but  
22 I would like that minimum information.

23 Is there anything, Mr. Lusky, that you need  
24 in addition to that realistically so we don't burden  
25 everybody and delay this matter even further?



1 MR. LUSKY: Your Honor, I can't answer that  
2 until I see what the Government produces; therefore,  
3 since your Honor has not directed the Government to  
4 comply with the terms of my request--

5 THE COURT: I'll direct them. I direct them  
6 to comply with the terms of the request under Rule 16.

7 MR. LUSKY: Has your Honor had an opportunity  
8 to read the five paragraphs of the request?

9 THE COURT: I'm granting it only insofar  
10 as I've now stated.

11 MR. LUSKY: All right.

12 What I'm saying is that it would be possible  
13 for the Government, in response to your Honor's  
14 rather general directions, to produce everything that  
15 is needed for the disposition of this case; however,  
16 a good deal of experience with discovery on my part  
17 leads me to think it possible that there will not be  
18 a very full compliance and therefore I would like  
19 your Honor please to include in your order a state-  
20 ment that this order is without prejudice to the  
21 further consideration of the present motion in the  
22 event that the Government's response makes that  
23 necessary.

24 THE COURT: I so find, and so direct.

25 MR. LUSKY: I would like to just add two or

1 or three very short things.

2 Your Honor has just raised the question as  
3 to what the practice of this Government is with  
4 respect to bringing people back from overseas with-  
5 out the aid of an extradition treaty. At pages 11  
6 and following of the motion in support of our  
7 original -- of the memorandum in support of our  
8 original motions to dismiss filed September 20th,  
9 1974, the authorities on this are canvassed and  
10 Xerox copies of various authorities are attached  
11 and referred to in the memorandum. I invite your  
12 Honor to refresh your recollection.

13 THE COURT: I could take judicial notice  
14 that way. I prefer to take it based upon the prac-  
15 tice.

16 MR. LUSKY: This does not come down to date,  
17 you understand.

18 THE COURT: I do.

19 MR. LUSKY: It goes back a ways. There are  
20 articles and extracts from books that are Xeroxed ,  
21 put into this memorandum.

22 THE COURT: I want to know current practice,  
23 over the last few years.

24 MR. LUSKY: The only other thing I wanted to  
25 mention which I'm sure your Honor has in mind -- what



1 I'm reading from is your Honor's memorandum of  
2 January 6th, is -- I mentioned it again, in practically  
3 all stages of the case -- and I don't criticize  
4 them for this -- the Government has emphasized the  
5 fact that the defendant, as they say, is a fugitive.  
6 It's a serious question to doubt that characteriza-  
7 tion in this particular case anyway, but their  
8 point is if a defendant does not come in and make  
9 himself available for a speedy trial, he loses his  
10 speedy trial rights.

11 In that connection, I simply want to invite  
12 your Honor's attention to the fact that that is  
13 squarely contrary to the words of this court's  
14 plan for the speedy disposition of criminal cases,  
15 I think it's called Plan for Achieving Prompt  
16 Disposition of Criminal Cases in this District, because  
17 a six-month limit is imposed by Section 4 of that  
18 plan.

19 Section 5 deals with excluded periods. The  
20 one that's pertinent here is 5(d), which I would  
21 just like to read. It's short.

22 "(d) The period of delay." The introduction  
23 to 5 says, "In computing time within which the  
24 Government should be ready for trial, the following  
25 periods should be excluded.

1           "(d) The period of delay resulting from  
2 the absence or unavailability of the defendant.  
3 A defendant should be considered absent whenever  
4 his location is unknown. A defendant should be  
5 considered unavailable whenever his location is  
6 known but his presence for trial cannot be obtained  
7 by due diligence."

8           Clearly, this defendant's presence--

9           THE COURT: You're getting into the merits,  
10 which I don't want to hear.

11          MR. LUSKY: Only because it's such merits  
12 that have come up.

13          THE COURT: I'm familiar with that. I have  
14 helped a lot.

15          MR. LUSKY: Finally, I doubt that this will  
16 be of any great help to the Court in view of the  
17 court's disposition of the case, of the motion,  
18 but I would like in order to have the record complete  
19 to tender the order that reflects, that would reflect  
20 a complete granting of our motion and just have it  
21 marked "tendered" and put in the record.

22          MR. MAHER: I was wondering in view of your  
23 Honor's suggestion for this matter, if we couldn't  
24 settle an order on this--

25          THE COURT: It would be preferable. Counsel



1 is entitled to have it marked.

2 MR. LUSKY: This is the ribbon copy. It  
3 should go to the Court Clerk, Defendant's Exhibit A.

4 THE COURT: Gentlemen, I hate to cut you off.  
5 but I've got a dreadful calendar.

6 MR. LUSKY: You're very generous with your  
7 time. If this argument is concluded, we can go  
8 off the record. I have one document I would like  
9 to give opposing counsel not relating to this case.

10 THE COURT: Very well, if we're finished  
11 with the case, if I get into document--

12 (Discussion off the record.)

13 ---  
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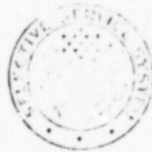
DOCUMENTS FROM SELECTIVE SERVICE FILE



SELECTIVE SERVICE SYSTEM  
DELINQUENT REGISTRANT REPORT

Approval  
not required

Selective Service System  
LOCAL BOARD NO. 62  
150 03 Jan 10 Avenue  
Brooklyn, New York 11202



175  
February 3, 1971  
(Date)

(Local Board Stamp)

TO: Hon. EDWARD E. BLANKEN, United States Attorney.

100 E. 12th St., 6th Fl., New York, N.Y. 10003  
(Address)

1. IDENTIFICATION OF DELINQUENT:

Full name of delinquent:		Last known address:		Last known telephone no.:	
<u>SAMUEL</u> (Last)	<u>SILVER</u> (First)	<u>E.</u> (Middle)	<u>None</u> (Alias, if any)		
<u>Polov Ben 10th 54-31 - San Juan, Jerusalem, Israel</u> (Number and street or R. F. D. route) (City, town, or village) (County) (State) (Zip Code)				<u>N/A (on 10-11-70)</u> 2210	
Selective Service No.:		Social Security No.:		Selective Service classification:	
<u>50 62 16 773</u>		<u>031 23 7115</u>		<u>1-A</u>	
Color of eyes:	Color of hair:	Height:	Weight:	Other obvious physical characteristics:	
<u>Brown</u>	<u>Black</u>	<u>5'5"</u>	<u>125</u>	<u>None</u>	
Date of birth:		Place of birth:		Date of registration:	
<u>Dec. 10, 1946</u>		<u>New York, N.Y.</u>			
Prior military service:				Place of registration:	
<u>None</u> (Armed Force) (Service number) (Date of entry)				<u>Jerusalem, Israel</u> (Date of separation)	
This delinquent has a court record as follows:					
Offense	Date of Conviction (Month, day, year)	Court (Name and location)	Sentence		
<u>None</u>					

2. OFFENSES:

This delinquent violated an order of this Local Board (check applicable box)

- ☒ Order to Report for Induction (SSS Form 252).  
☐ Order for Transferred Man to Report for Induction (SSS Form 253).

He committed this violation by (check applicable box)

- ☒ Failing to report for induction.  
☐ Reporting for induction but failing or refusing to submit to induction into the Armed Forces at the Armed Forces Examining and Entrance Station located at \_\_\_\_\_

(Address)

The order indicated was mailed on Dec. 22, 1970 to this delinquent at

(Date of mailing)

Shikun Telnet 10/52 Jerusalem, Israel

(Address)

to report on Jan. 12, 1971

(Date)

In addition to failing to report for induction into the Armed Forces this delinquent has also failed to perform the following duties at the times indicated:

DUTIES

Failed to Report for Ind. P.S.

DATES

May 3, 1970

### 3. EFFORTS MADE TO LOCATE DELINQUENT:

The delinquent                      been located on Jan. 13, 1972 at 1212 1/2 St. N. W.  
(Has, has not) (Date) (Address)

The person who will always know the delinquent's address is 1240 Harrison St. 11-14-43  
(Name)

\_\_\_\_\_ This person \_\_\_\_\_ been contacted by \_\_\_\_\_  
(Address) (Yes, has not)

\_\_\_\_\_ on Nov. 20, 1970 with the following result \_\_\_\_\_  
(Letter, telephone, in person) (Date)

Received from Mrs. J. H. H. 10/10/10

The delinquent's last known place of employment or business is \_\_\_\_\_ (Name)

\_\_\_\_\_, \_\_\_\_\_ His employer \_\_\_\_\_ been contacted by  
 (Address) (Telephone number) (Has, has not)

\_\_\_\_\_ on \_\_\_\_\_ with the following result \_\_\_\_\_  
(Letter, telephone, in person) (Date)

4. Mail directed to the delinquent \_\_\_\_\_ returned by the post office.

5. REMARKS: (Include additional efforts to locate delinquent or names of individuals who may know whereabouts of the delinquent.)

Copies of  
Letter from Registrant and L.B. reply attached hereto and is self-explanatory.

Registrant has had following classifications:

2-65	2-S
11-65	1-D
11-67	2-S
7-68	1-A
10-68	2-
6-69	1-D
1-70	1-A

## 6. FUTURE INFORMATION:

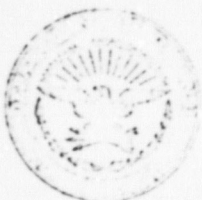
You will be advised promptly by letter of any change in this delinquent's status and of any additional facts which may come to the attention of this board concerning his whereabouts or which may aid you in apprehending and prosecuting him.

J. B. Belmont  
(Member, Executive Secretary or Clerk of Local Board)

This form shall be used to report to the United States Attorney those delinquents who fail to report for induction or who fail or refuse to submit to induction. Other delinquencies, if reported to the United States Attorney, shall be reported by letter.

This form shall be made out in quadruplicate. The original and two copies are forwarded to the State Director of Selective Service, who shall transmit the original and one copy to the United States Attorney for the judicial district in which the local board is located and retain one copy. One copy of the form shall be filed in the Cover Sheet (SSS Form 101) of the delinquent.





DEPARTMENT OF THE ARMY  
HEADQUARTERS, UNITED STATES ARMY, EUROPE AND SEVENTH ARMY  
APO 6103

176a

ABAAG-PR

21 March 1970

Mr. Henry Solomon  
Station 1240, Block 10/52  
Jerusalem, Israel

Dear Mr. Solomon:

In reply to your letter of 11/11/69, it is requested that you report to the ~~Examination Station~~ <sup>Examination Station</sup>, 501 Logistical Command, Livorno, Italy, on 22 May 1970, at 0900 hrs. for preinduction processing.

On arrival at the examining station, you must have the letter from your local board, all records and papers received with it, and this letter in your possession.

This is not to be construed as a notice to report for induction into the Armed Forces of the United States. It is recommended that you continue to pursue your normal activities in this command. For any additional information concerning your Selective Service status, contact your local board.

For your information, you must pay all expenses going to, while at, and returning from the examining facility.

Sincerely,

TEL: RM (213) 8577/8325

GENE P. BISHARDI  
CPT, JCO  
Actg Ch Proc Rm

Service System  
BOARD No. 61

JAN 21 1970

38 Jamaica Avenue  
Jamaica, N.Y. 11434

HQ AE FI A 30-1  
20 Feb 67

Selective Service System  
Local Board No. 61

176 b

165-08 Jamaica Avenue  
Jamaica, N.Y. 11432

Sidney Salzman  
Shikun Taipiot 10/52  
Jerusalem, Israel  
30.4.70  
50-61-46-773

Selective Service System  
Local Board No. 61  
165-08 Jamaica Avenue  
Jamaica, New York. 11432

Dear Sir:

I had until recently a 4-D classification owing to my studies for the rabbinate. I was, unfortunately, taken away from my studies because of moving and certain family affairs, and was unable to continue my studies during my first few months in Israel for similar reasons.

Would you please advise me if I can still be eligible for a 4-D classification if I resume my studies at this time.

If that is the case please consider this letter an appeal. Please be advised that your letter of Jan. 20 arrived at my home on the 8th of March (together with your letter for an appointment for a physical) -- a delay of several months-- well after the appeal deadline.

I would appreciate a speedy reply before the date of my appointment for a physical on May 27 in Livorno, Italy.

Thank you.

Sincerely,



176 C

Mr. Sidney E. Salzman  
Shikun Telpot 10/52  
Jerusalem, Israel

May 6, 1970

50-61-11-773

Mr. Sidney E. Salzman  
Shikun Telpot 10/52  
Jerusalem, Israel

Dear Sir:

If you are a full time student divinity student, please have school submit verification of your attendance to this Local Board. You will then be advised of Local Board determination. You are further advised to report for preinduction physical examination as scheduled.

BY DIRECTION OF THE LOCAL BOARD

I. Mahoney, Clerical Assistant

Encl: NYC FL#2

1762

June 30, 1970

50-61-46-772  
#41

Mr. Sidney B. Salomon  
2 Shikma Talpilot 10/52  
Jerusalem Israel

Dear Sir:

This Local Board has been advised by the Department of the Army, Headquarters, 8th Logistical Command, APO 09019, that you failed to report for pre-decision physical examination as scheduled.

Please be advised of your continuing obligation to report for this examination. You should contact the Department of the Army immediately and request a new date to report for this examination.

BY DIRECTION OF THE LOCAL BOARD

I. Mahoney, Clerical Assistant



SELECTIVE SERVICE SYSTEM  
LOCAL BOARD # 61  
165-08 JAMAICA  
JAMAICA 32. N. Y.

177

Rehov Ben Zekai 54/11  
Jerusalem, Israel  
Dec. 17, 1970  
50 61 46 773  
#41

Selective Service System  
Local Board # 61  
165-08 Jamaica Av.  
Jamaica, N.Y. 11432

Dear Sirs:

On June 30, 1970, a letter was sent to me from you to the effect that you had been advised by the Department of the Army, Headquarters, 8th Logistical Command, APO 09019, that I had failed to report to my pre-induction physical examination as scheduled.

The fact that I failed to show up at the physical was due to the shortage on my part of the necessary Dollars required to undertake such a trip. This is also the reason for my continuing failure to appear at said physical examination.

Although I work at present I get paid only in local currency and a trip abroad must be paid for in Dollars or else an exorbitant tax is levied. The money that I make is barely enough to support my wife and me and we find it quite impossible to save money in the immediate future for such a large expense.

Please excuse the tardiness of this reply and I hope that you take my situation into account.

Sincerely yours,

*Sidney Salzman*  
Sidney Salzman

December 30, 1970

50-61-46-173  
RS# 70-42

Mr. Sidney Salasman  
Rehov Ben Zekai 54/11  
Jerusalem, Israel

Dear Sir:

Enclosed please find a copy of SSS Form #252, Order to Report for Induction, mailed on Dec. 22, 1970, and letter advising you that your random sequence number; #41, places you in the "Extended Priority Selection Group". Copies are forwarded to you since your recent letter contains a change of address (as above).

Please be advised of your continuing obligation to report for induction; you must pay all travel expense involved. Failure to report for induction will result in your being reported to the United States Attorney.

BY DIRECTION OF THE LOCAL BOARD

ENC: SSS Form #252  
& Letter

I. Mahoney, Clerical Assistant

BEST COPY AVAILABLE





SELECTIVE SERVICE SYSTEM

Approval Not Required

## ORDER TO REPORT FOR INDUCTION

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COPY.

The President of the United States,

To

Mr. Sidney E. Salzmänn  
Shikun Talpiot 10/52  
Jerusalem, Israel

(LOCAL BOARD STAMP)

Dec. 22, 1970

(Date of mailing)

cc: 84-34 126th St. Kew Gardens, N. Y. 11415

SELECTIVE SERVICE NO.

50 61 46 773

## GREETING:

#41

You are hereby ordered for induction into the Armed Forces of the United States, and to report

at INDC. No. 115

(Place of reporting)

on JAN. 18, 1971 at 7:00 AM

(Date)

(Hour)

for forwarding to an Armed Forces Induction Station.

(Member, Executive Secretary, or clerk of Local Board)

## IMPORTANT NOTICE

(Read Each Paragraph Carefully)

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters. Be sure to take the following with you when reporting to the induction station. The documents will be returned to you: (a) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE—original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (b) FOR LEGALLY ADOPTED CHILD—certified court order of adoption; (c) FOR CHILD OF DIVORCED SERVICE MEMBER (Child in custody of person other than claimant)—(1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (d) FOR DEPENDENT PARENT—affidavits establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. To protect your right to return to your job if you are not inducted, you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you.

BEST COPY AVAILABLE

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Please note Change  
of Address:

Rehov Ben Zakai 54-11  
San Simon, Jerusalem  
Israel  
Jan. ~~WEDNESDAY~~ 6, 1971  
Re: #41  
50 61 46 773

Selective Service System  
Local Board No. 61  
165-08 Jamaica Avenue  
Jamaica, N.Y. 11432

Dear Sirs:

Having just received my order to report for induction I wish to inform the Board that since I am in Israel I have no means at my disposal to appear at the Examination and Entrance Station at Fort Hamilton at the time and date specified.

Furthermore, I wish to bring to the attention of the Board that my wife and I, upon coming to Israel, have decided to make our permanent home here. This decision was the culmination of many years of education and training in this direction and was, I believe, a perfectly natural and legitimate one on our part. We came here not with the desire to escape our former obligations and ties but, rather, to enter into new ones closer to our hearts, here in our ancient homeland, Israel.

Having made the decision to remain here I will be required in the near future to serve in the Israel Defence Forces, an act which I consider to be my personal duty as a Jew.

I therefore appeal to the Board to reconsider my case and grant me an extension until such time as I will be inducted into the Israel Defence Forces, at which time I hope my case can be closed legally.

Sincerely yours,

*Sidney Sal*  
Selective Service System  
Sidney Sal LOCAL BOARD No. 61

JAN 14 1971

165-08 Jamaica Avenue  
Jamaica, N.Y. 11432



Sanctioned Executive Order  
100-100000  
100-100000  
Jerusalem, E. Y. 100000

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February 3, 1971

SSS 53-62-46-7713  
100-70-41

Mr. Sidney H. Salzman,  
Rehov Ben Zvi 54-11  
San Simon, Jerusalem, 100000

Dear Sir:

Your letter dated January 6, 1971, received at this Local Board January 17,  
is acknowledged.

You are advised that since you have failed to report for induction as  
ordered and have no intention to comply with such obligation in the  
immediate future, the matter is being reported to the U.S. Attorney for  
prosecution.

BY DIRECTOR OF THE LOCAL BOARD

Exec. Secretary.

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SALAMIN, SIDNEY B.  
1 Ohov Pori Telavi 54-11  
San Simon, Jerusalem, Israel  
SOB 50-51-46-773 SOB '70-41

Dear Sir:

BY DIRECTION OF THE LOCAL BOARD

Exec. Secretary.



Rehov Ben Zeev 54-11  
San Simon, Jerusalem  
Israel

183  
SSS 50-61-46-773  
RSN-70-41

February 13, 1971

Selective Service System  
LOCAL BOARD # 61  
165-08 Jamaica Avenue  
Jamaica, N.Y. 11432

Selective Service System  
LOCAL BOARD No. 61  
165-08 Jamaica Avenue  
Jamaica, N.Y. 11432

Dear Sirs:

Your letter dated Feb. 3, 1971, is acknowledged.

Please be advised that at no time did I assert that I have no intention of complying with my obligation to report for induction. I did, however, mention that my financial situation does not at this time allow me a trip to the United States.

In addition to this I would like to request from you a financial statement form in as much as my wife is pregnant and I might be eligible for a change of classification due to my financial situation.

Furthermore, if there is to be any prosecution I would appreciate any information you could give me on appealing and defending myself, from Israel of course. I am confident that you will do your utmost to help me defend my rights. Let me make it clear at this point that I have appointed no one to represent me for matters pertaining to the Selective Service System. Therefore, any and all information, correspondence and other intercourse between myself and the Local Board must be done directly through me and through nobody in the United States as I am responsible to no one there, having reached majority more than three years ago.

Awaiting further correspondence I remain  
Sincerely yours

UNITED STATES v. HOWARD G. LOCKWOOD	-	CR 43456 (1954)
UNITED STATES v. DONALD CHARLES DEWEY	-	66-CR-456
UNITED STATES v. DAVID ARTHUR LIDOV	-	68-CR-67
UNITED STATES v. MICHAEL ROSENBAUM	-	68-CR-204
UNITED STATES v. BARRY LAWRENCE FRIEDMAN	-	69-CR-54
UNITED STATES v. ALAN STEPHEN DORN	-	69-CR-57
UNITED STATES v. FRANKLIN WILSON	-	69-CR-155
UNITED STATES v. ARTHUR MARC CAMPUS	-	69-CR-182
UNITED STATES v. MAURICE A. HENRY	-	71-CR-1338
UNITED STATES v. JAMES RALPH BLUMER	-	72-CR-478
UNITED STATES v. THOMAS MARTIN AUSTIN	-	72-CR-494
UNITED STATES v. RONALD EDWARD TERRITO	-	72-CR-622
UNITED STATES v. PAUL PARKER	-	72-CR-739
UNITED STATES v. SIDNEY E. SALTZMAN	-	72-CR-740
UNITED STATES v. CHARLES FENN SLEETH	-	72-CR-757
UNITED STATES v. ALVIN MARRIS HIGGS	-	72-CR-780
UNITED STATES v. ROBERT RICHARD PEREZ	-	72-CR-803
UNITED STATES v. ALBERT ANTONIO MARTINEZ	-	72-CR-810
UNITED STATES v. EDWARD JAMES LUERSSEN	-	72-CR-824
UNITED STATES v. MICHAEL DAVID FRAZIER	-	72-CR-834
UNITED STATES v. THOMAS JOHN COLLURA	-	72-CR-1028
UNITED STATES v. JAMES THOMAS BEZOUSEK	-	72-CR-1290
UNITED STATES v. RAUL ESTREMER	-	72-CR-1291
UNITED STATES v. LESTER PATRICK NOLAN	-	73-CR-41
UNITED STATES v. MICHAEL DAVID POWERS	-	73-CR-126
UNITED STATES v. KENNETH PUAL ALBANESE	-	73-CR-132

MEMORANDUM OF AMICUS CURIAE  
RE: MOTION TO DISMISS FOR DENIAL OF SPEEDY TRIAL

The memorandum of distinguished counsel for defendants ably summarizes the law of speedy trial, and presents a basis for dismissal of these cases. Nonetheless, amicus disagrees with some possible and logical interpretations of defense counsel's submission, while agreeing with its central contention that an indictment may not be used as an instrument of exile.

The government's obligation to provide a speedy trial is set out in defense counsel's memorandum. See also Strunk v. United States, 412 U.S. 434 (1973). A central issue in these cases is the impact of defendants' absence upon their speedy



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trial rights; in fact, the issue is waiver. See United States v. Colitto, 319 F. Supp. 1077 (E.D. N.Y. 1970).<sup>1/</sup>

In his memorandum, defense counsel advances an interpretation of the government's duty to pursue indictees. Counsel states that the federal government is "obligated to seek, through diplomatic channels, the return of a felony defendant who has fled to another country." Memorandum, p. 8. At p. 11, he argues that this obligation extends to seeking extradition as a matter of comity, or even deportation, of a fugitive Selective Service defendant. The power of the Executive to extradite as a matter of comity, or to deport, is discussed at pp. 11-12.

Earlier, at p. 10, defense counsel seems to suggest that the government should have summoned parents, relatives and acquaintances before the grand jury in an effort to locate the defendants.

Amicus, while agreeing that a prima facie case has been made of denial of speedy trial, and of prejudicial preindictment delay, disagrees with the above assertions. Extradition, as a device for obtaining the return of a fugitive defendant from another country, is a well-regulated procedural device of public international law. Its root principles are sovereignty, reciprocity, and double criminality. Sovereignty, in this context, means only that, in the field of criminal law, the power of a state stops at its frontier. Reciprocity refers to the requirement that the demanding state grant the same benefit it seeks from

<sup>1/</sup> At least to the extent defense counsel's statement (Memorandum, p. 5) "it may fairly be assumed . . . that the defendants sought delay by avoiding arrest." is contrary to Hickory v. United States, 106 U.S. 408 (1896), amicus disagrees with it.

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the rendering state.<sup>2/</sup> The requirement of double criminality is satisfied if the offense is a crime under the laws of both the demanding and the rendering state. There are other principles and requirements, such as the generally-observed rule that military, political and fiscal offenses are not extraditable. See generally 2 A Treatise on International Criminal Law 309-335 (M.C. Basiouni & V. Nanda eds. 1973).

Under modern treaties and practice, courts recognize that the fugitive, not only the states concerned, has rights under the international law of extradition. The maxim male captus bene iudicatus is giving way to the maxim ex iniuria jus non oritur. Treatise, supra, at 325; cf. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

Attempts to secure the return of a fugitive outside the framework of a treaty may well violate public international law and infringe the rights of the fugitive. Given the insistence in American law that rendering fugitives to foreign states must proceed strictly according to treaty, Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936), it would ill become an American court to suggest that our own government seek return of fugitives by questionable means.

To the extent that the holding in Valentine, the principle of double criminality, and the rule that political and military offenses are not extraditable are requirements of public international law, they are binding upon the courts of the United States

<sup>2/</sup> Compare the 1880 resolution of the Institute for International Law: "La condition de reciprocité, en cette matière, peut être commandée par la politique: elle n'est pas exigée par la justice."



under the Supremacy Clause, U.S. Const., art. III, § 2,<sup>3/</sup> and 187  
confer rights upon litigants in courts of the United States.  
The Paquete Habana, 175 U.S. 677 (1900). See Banco Nacional  
de Cuba v. Sabbatino, 376 U.S. 398 (1964).

The use of deportation as a substitute for extradition,  
at least where it can be proven that deportation is a "sham  
extradition" is contrary to international law, or at least  
alien to the practice of civilized states. Compare Regina v.  
Governor of Brixton Prison (Ex parte Soblen), [1963] 2 Q.B. 243,  
reprinted in 8 British Int'l L. Cases 477 (1971).<sup>4/</sup>

In short, amicus does not believe the speedy trial rules  
should be interpreted so as to place a duty upon the government to  
pursue fugitives by means such as deportation or non-treaty extra-  
dition from the countries in which they have found asylum.

In the same vein, amicus does not believe that the court  
should impose a duty upon the government to summon parents,  
relatives and friends of the accused before a grand jury to  
testify. Such persons may be able to refuse to testify if their  
testimony could be used as evidence against them on a charge of  
harboring, 18 U.S.C. §§ 3,1073. Other such witnesses might have

<sup>3/</sup> At least where not abrogated by treaty.

<sup>4/</sup> The United States was a leader in establishing extradition  
treaties as a preferred means of international criminal judicial  
assistance. It should be noted that the decision not to request  
extradition is made by the political department of the govern-  
ment, perhaps for reasons unrelated or even contrary to the goals  
of a state's internal law. The State Department may not have  
sought extradition of draft fugitives for fear of giving offense  
to other states.

If this has been the case, the government should allege and  
prove it. Ultimately this Court would decide how much deference  
to accord the State Department's decision. See generally Tigar,  
Judicial Power, the "Political Question Doctrine," and Foreign  
Relations, 17 U.C.L.A. L. Rev. 1135 (1970), reprinted in 3 The  
Vietnam War and International Law (R. Falk ed. 1972).

available a lawyer-client privilege, cf. In re Kinoy, 326 F. Supp. (S.D. N.Y. 1970). Courts have not, in general, recognized any privilege of a mother, father, relative or friend, to refuse to testify on grounds analogous to those underlying the husband-wife privilege. See generally Article V, Proposed Federal Rules of Evidence, and Advisory Committee Notes thereto. The absence of any such rule of privilege is not, however, an affirmative command that the government place parents, relatives and friends in a difficult and conscience-taxing position. This war has claimed victims enough.

Undeniably, the government has an obligation to seek out persons indicted, to inform them of the pendency of the proceedings. Failure to seek the defendants in these cases diligently and by all reasonable means would be a ground for dismissal, on the authority cited by defense counsel. The government should file a status report on its efforts in this direction.

The considerations advanced by this Court in its Opinion of September 30, 1974, suggest that the government and the Court have additional duties. They must strive together to bring every criminal case to a just conclusion. In the ordinary case, perhaps this burden is discharged by continuing to seek the defendant in order to arrest him. In Selective Service cases, however, as the Court has noted, the relative lack of prosecutorial success may impose a higher duty. The law of Selective Service has, since 1967, been revolutionized by a series of Supreme Court, court of appeals and district court decisions. See, e.g., Gutknecht v. United States, 396 U.S. 295 (1970); Green v. Local Board, 396 U.S. 460 (1970); Mulloy v. United States, 398 U.S. 410 (1970); McKart v. United States, 395 U.S. 185 (1969); Welsh v. United States, 398 U.S. 333 (1970), to list only the more



Given the delay which often intervenes between the local board classification action and the eventual indictment of a draft refuser or other alleged Selective Service offender, the induction order has often been tested by standards which are different from those applied by the volunteer local board. Opinion, p. 11.

The government has, therefore, the continuing duty to review the files in Selective Service cases to weed out those cases in which changes in the law--as well as the existence of previously unnoticed defenses--make conviction at trial unlikely. The Court should request the government to conduct such a review and to report its findings.

Such review would go far towards reducing the backlog of thousands of unresolved draft cases. The official Justice Department figures on this backlog, obtained from a computer printout supplied by Deputy Assistant Attorney General Kevin Maroney, are attached hereto as Exhibit A.

Amicus suggests also that the government produce a copy of each defendant's Selective Service file, so that the Court and defense counsel may examine it to determine whether there is any ground for dismissal appearing on the face of the file. The Court has the power, indeed perhaps the duty to notice errors in the commencement of the prosecution, Opinion, pp. 16-17. See also, District of Columbia v. Horning, 47 App. D.C. 413, 419 (1918). Horning is particularly significant because it states that a trial judge may and probably should notice of his own motion whether grounds exist for quashing an accusatory pleading. A motion to dismiss a Selective Service indictment for invalidity of the induction order would be, in pre-Federal Rules practice, a motion to quash, as distinguished from a motion in bar or abatement. 2 L. Orfield, Criminal Procedure Under the Federal Rules § 12:9 (1966).

Production of files is authorized by Registrants' Processing Manual, § 608.3. Alternatively, the government has stated that the file was in evidence before the grand jury which returned each indictment. Hence, under Fed. R. Crim. P. 6(e), the file is producible, as part of the minutes, "preliminarily to or in connection with" the judicial proceedings pending in each case.

If necessary, additional counsel may be appointed to assist in the review of files. This review should be accomplished promptly, so that unworthy cases are dismissed and only the others, if any, are left as subjects for the pretrial diversion program established by President Ford.

One sure test of whether the continued pendency of these indictments is an instrument of exile is the legality of the induction order or other command to which each defendant allegedly refused or failed to respond.<sup>5/</sup>

Respectfully submitted,

WILLIAM S. CONNOLLY & CALIFANO

By

Michael E. Tigar

*W. S. Connolly & Califano  
w. indict on other  
counts*

BEST COPY AVAILABLE

<sup>5/</sup> Charges involving other duties, such as failure to report change of address, may also be evaluated in large measure from information appearing in the file.